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A Manual

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JUDICATURE ACT, 1875.

BY

CHARLES FRANCIS TROWER, ESQ., M.A.,

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LONDON:

BUTTERWORTHS, 7, FLEET STREET,

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PREFACE.

Eight and twenty years ago I protested, with all the energy I could command, in a Pamphlet,* by some thought Utopian, by others premature, against the intolerable nuisance and unphilosophical absurdity of a Distinct Administration of Law and Equity.

To-day, I find myself sitting down to edit a portion of an Act for its abolition!

I confine myself to a single section (25). It alone has "amended and declared the Law to be hereafter administered in England," with reference to those great Principles of Equity, which are universally to "prevail." The rest of the Act is Procedure chiefly.

Returned 9-2-53

It is hoped the following pages may be useful at least to the Common Law Branch of the Profession, which finds itself called on now for the first time to apply those Principles to Practice.

I have thought it sufficient to verify propositions by a reference to a single case, or good text book which has

* The Anomalous Condition of English Jurisprudence, Hatchard & Sons, London, 1848.

783163

collected the cases; as a multiplicity of authorities, like time-pieces in a clock-maker's shop, tends only to distract. To facilitate reference, I have stated in the notes the *particular page* of such judgments as establish an important position.

I have also attempted to define terms which seemed to require it; and that, as soon after using them, as the state of the context has allowed—feeling strongly that definition is of the essence of all scientific investigation.

In Chapters III., VI., VII. and X., I have been largely indebted to Mr. Tudor's invaluable work on "The Leading Cases in Equity."

I have dispensed with side notes, and preferred the more exhaustively logical analysis, by letters and figures, adopted by Bacon, Viner, Comyns and others.

The reader's attention is, however, earnestly entreated to the directions on p. x, fronting Ch. I; *with it*, he will, I think, be able to easily "read off" each subject, and find his particular point; but *without it*, he may perhaps charge with obscurity the compressed style purposely adopted by me, as being that in which any Code of Law must eventually express itself—for to a Code, I trust and believe, we are fast tending.

7, New Square, Lincoln's Inn,
March, 1876.

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ERRATUM.

Page 65, note (*f*).—For "*Boahm*," read "*Boehm*."

DIRECTIONS TO THE READER.

Paragraphs headed by small *letters* within brackets, thus (a), (b), &c., are logical subdivisions of those headed by small Roman *numerals* within brackets, thus (ii.), (iii.), (iv.), &c.; which are subdivisions of those headed by Arabic *numerals*, thus, 1, 2, 3, &c.; which, again, are subdivisions of those headed by Roman *numerals*, thus, I., II., III., &c.; which, lastly, are subdivisions of those headed by Capital *letters* within square brackets, as [A.], [B.], &c. These last are also employed, when the *ipsissima verba* of the Acts are quoted.

Manual

OF

THE PREVALENCE OF EQUITY, &c.

Chapter I.

ON THE ADMINISTRATION OF INSOLVENT ESTATES.

38 & 39 Vict. c. 77, sect. 10.

"*In the administration by the Court of the assets of any person who may die after the commencement of this Act*" (i. e., 1 *Nov.* 1875) (*a*), "*and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, and in the winding-up of any company under the Companies Acts,* 1862 *and* 1867, *whose assets may prove to be insufficient for the payment of its debts and liabilities and the costs of winding-up, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt; and all persons, who in any such case would be entitled to prove for, and receive, dividends out of the estate of any such deceased person, or out*

(*a*) 38 & 39 Vict. c. 77, s. 2.

of the assets of any such estate, may come in under the decree or order for the administration of such estate, or under the winding-up of such estate, and make such claims against the same as they may respectively be entitled to by virtue of this Act."

[A.]

"*For the Payment in full of his Debts and Liabilities.*"

The Act does not define "debts" or "liabilities;" it is presumed, therefore, that the interpretation of them, such as it is, in the Bankruptcy Act, 1869 (*b*), applies.

[B.]

"*Rights of Secured and Unsecured Creditors.*"

(I.)

Who are Secured Creditors.

A "secured creditor" (adopting the definition thereof in the Bankruptcy Act, 1869, which, it is presumed, is the one to be adopted here) is one holding any mortgage, charge or lien on the bankrupt's estate, or any part thereof, as a security for a debt due to him (*c*), and includes a creditor who has levied execution, by seizure only, under a *fi. fa.* (*d*).

A "*lien*" is either a common law (*i. e.*, a retaining) lien, where the owner of the lien has possession of the property, or an equitable (*i. e.*, a non-retaining) lien, where the owner has not possession of the property.

A "retaining" lien is the right to retain possession of a moveable chattel till a debt due from the owner of the chattel to the possessor is paid (*e*), and is either—

Particular—(which is favoured in our courts) (*f*),

(*b*) 32 & 33 Vict. c. 71, ss. 4, 31.
(*c*) *Ibid.* s. 16, para. 5.
(*d*) *Ex parte Rocke*, 6 Ch. 795.
(*e*) Per Grose, J., in *Hammond* v. *Barclay*, 2 East, 235.
(*f*) *Rushforth* v. *Hadfield*, 7 East, 227.

i. e., a lien on specific goods for specific charges (*g*) (*i. e.*, incurred about those very goods).

General—(which is disfavoured) (*h*), *i. e.*, a lien (still on specific goods) extending to a general balance due to the creditor for work done, or money expended, in a particular business, but not necessarily on the very goods (*i*).

The principal "non-retaining liens," and which attach to real as well as personal estate (*k*), are—

Judgments entered up one year before the bankruptcy (*l*), if the land has been delivered in execution and the writ of execution registered (*m*).

Vendor's lien for unpaid purchase money (*n*) of real estate.

Assignments for value of equitable choses in action (*o*).

Covenants to settle particular property (*p*).

Assignments for value (by the owner) of goods in the hands of his agent or consignee having notice of the assignment (*q*).

Cestui que trust's interest in lands purchased with trust monies (*r*).

A pawn or pledge (which seem the same, and to be included under "mortgage," though they differ from it and "lien") is confined to personal chattels, and passes to the pawnee only the possession, or at most only a special property in them. The pawnee has a right to sell without any express power, and the pawner has all his life to redeem in, if no time is named for

(*g*) *Weldon* v. *Gould*, 3 Esp. 268.
(*h*) 7 East, 227.
(*i*) 3 Esp. 268.
(*k*) *Houghton* v. *Matthews*, 3 B. & P. 485.
(*l*) 1 & 2 Vict. c. 110, ss. 13, 19.
(*m*) 27 & 28 Vict. c. 112.
(*n*) 5 Jarm. Byth. (Sw.) 14 (3rd ed.)
(*o*) *Ryall* v. *Rowles*, 1 Ves. 348; and see *infra*, Ch. VI.
(*p*) *Freemoult* v. *Dedire*, 1 P. Wms. 429.
(*q*) Cross on Lien, 78.
(*r*) *Lane* v. *Dighton*, Ambl. 409; and *infra*, Ch. II.

redemption (*s*), unless the case be within the Pawnbrokers' Act (35 & 36 Vict. c. 93).

(II.)

Rights of Secured Creditors.

(1.)

Under the Bankruptcy Act, 1869.

(i.) They may realize their security out of Court, if they have a power of sale (*t*).

(ii.) They may otherwise deal with their security, and have their remedies, as before the Act (*u*).

E.g. (if mortgagees), ejectment, foreclosure, tacking, marshalling, consolidation.

Tacking—*e.g.*, a *puisné* mortgagee without notice getting in a prior legal mortgage, and *vice versâ*, may "squeeze out" *mesne* incumbrances (*v*).

Marshalling—as where A. has a security on Whiteacre, and B. on Whiteacre and on Blackacre, A. may throw B. on Blackacre only (*w*).

Consolidation (often, but wrongly confounded with tacking (*x*))—*e.g.*, a mortgagor, and those claiming under him, cannot redeem one of two mortgages, legal or equitable, from him (meeting in the same mortgagee) without the other (*y*).

(iii.) They may give up their security, and prove for the whole debt (*z*).

The word "specific" in sect. 40 is not defined, and seems not to carry the matter further, and to have crept into the Act *per incuriam*. Every secured creditor is specifically secured.

(iv.) They may after realizing, or giving credit for

(*s*) 2 Spence, Eq. Jur. 772.

(*t*) Bankruptcy Act, 1869, s. 12.

(*u*) *Ibid.*

(*v*) Fisher on Mortgages (2nd ed.), p. 649.

(*w*) *Lanoy* v. *D. of Athol*, 2 Atk. 446.

(*x*) 2 Davids. Conv. (3rd ed.) 839; as to the difference, Fisher, p. 679.

(*y*) *Watts* v. *Symes*, 1 De G., M. & G. 246.

(*z*) Bankruptcy Act, 1869, s. 40.

the value of, their security, have a dividend for the balance in the manner and at the time prescribed (*a*) (*i. e.*, by the General Bankruptcy Rules).

(v.) They may "rest," or rely, on their securities (*b*) (*i. e.* do nothing), unless the trustee in bankruptcy redeem them, as he may, before realization, at the value at which, if proceeding afterwards to proof (as they may) for the balance due to them after deducting such value, they must have estimated them (*c*). In this case they must pay over to the trustee, on a subsequent realization, any surplus beyond (*d*), but may not increase proof for any deficiency (*e*) below, such estimated value.

(vi.) They may apply to the Court of Bankruptcy to realize the security, and prove as creditors for the deficiency (*f*) which it fails to realize, and receive dividends on such deficiency, rateably with the other creditors, not disturbing former dividends (*g*.)

> The Court shall thereupon inquire whether the creditor is entitled to the security, for what consideration, and under what circumstances; and if he is found mortgagee, or entitled to such security, and no sufficient objection to his title appear, shall take account of the principal, interest and costs, and of the rents and profits, or dividends, and interest or other proceeds, received by or for him if in possession, and shall give notice in public papers when and where, and by whom and in what way, the property is to be sold; and such sale is to be made, and the trustee to conduct it (*h*). All proper persons to join in conveyance (*i*), and the proceeds to go to pay

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(*a*) Bankruptcy Act, 1869, s. 40.
(*b*) Robson, 277.
(*c*) Bankruptcy Rules, 1869, Nos. 99, 100.
(*d*) *Ibid.* No. 100.
(*e*) *Ibid.* No. 101.
(*f*) *Ibid.* No. 78.
(*g*) *Ibid.* No. 80.
(*h*) *Ibid.* No. 78.
(*i*) *Ibid.* No. 79.

the trustee's costs, and then mortgagee's principal and interest and costs; the surplus, if any, to trustee (*k*).

The "*interest*" so payable is interest not exceeding 4 per cent. *to* the date of the order of adjudication *from* the time the mortgage debt was payable (if under a written instrument at a certain time); if otherwise, from the time of a written demand giving notice that interest will be claimed (*l*).

(2.)

Rights in Equity of a Secured Creditor prior to the Bankruptcy Act, 1869.

The rights of a secured creditor in equity—at least of a legal mortgagee—were that, in an administration suit, he might prove before the chief clerk for his whole debt, and afterwards realize his security for any deficiency. Under that rule a mortgagee for (say) 1,000*l.* (the value of the security being 500*l.*, and the dividend paid on the bankruptcy being 10*s.* in the £) might get 500*l.* by realizing, and 500*l.* by proof: thus obtaining his whole 1,000*l.* (*m*). For this the more equitable rule in bankruptcy is adopted (so the subsection is really a "Prevalence of Equity"): under which, he can prove for 500*l.*, thus obtaining by way of dividend 250*l.*; and selling for 500*l.*, get in all 750*l.*

(III.)

Unsecured Creditors.

These are not defined by either the Bankruptcy or Judicature Acts; but may be sufficiently defined negatively, as "creditors not holding any mortgage, charge or lien on the bankrupt's property."

(*k*) Bankruptcy Rules, 1869, No. 80.
(*l*) *Ibid.* No. 77.
(*m*) *Mason* v. *Bogg*, 2 M. & C. 418.

Unsecured debts, unless preferential ones, are paid in bankruptcy *pari passu.*

Preferential debts, which are paid in full before any others are paid in part, but abate *inter se* (*n*), are—

(1.)

One year's arrears of assessed taxes to April 5 before the adjudication order, including land, property and income tax, not exceeding one year's assessment (*o*).

(2.)

Parochial and other local rates due at and within 12 months of order of adjudication (*p*).

(3.)

Four months' wages or salaries, not exceeding 50*l.*, to clerks and servants (*q*).

(4.)

Two months' wages of any labourers or workmen (*r*).

(5.)

Rent for one year prior to the order of adjudication (*s*).

[The remedy for rent is distress, and proof for any overplus for which the distress is not available (*t*).]

[C.]

"*And as to Debts and Liabilities provable.*"

The provisions of the Bankruptcy Act, 1869, on the points as to which the sub-section here refers us to it, are certainly a singularly tangled piece of legislation. I can only state, without professing to understand, it.

All debts (and liabilities as presently interpreted) present or future, certain or contingent, except demands in the nature of unliquidated damages (*u*) arising otherwise

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(*n*) Bankruptcy Act, 1869, s. 32.
(*o*) *Ibid.* (1).
(*p*) *Ibid.*
(*q*) *Ibid.* (2).
(*r*) *Ibid.*
(*s*) *Ibid.* s. 34.
(*t*) *Ibid.*
(*u*) What are, see Chap. VII.

than by contract or promise, to which the bankrupt is subject at the adjudication order, or may become subject to during the bankruptcy by any obligation incurred prior to such order, are debts provable in bankruptcy, and may be proved in the prescribed manner before the trustee in bankruptcy (*x*).

"Debt provable in bankruptcy" includes any debt or liability by the Bankruptcy Act made provable in bankruptcy (*y*).

Liability includes—

Compensation for work or labour done.

Obligations, or the possibility thereof, to pay money or money's worth on the breach of any express or implied engagement, agreement, or undertaking to pay, or capable of resulting in the payment of, money or money's worth, whether such payment be, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any contingency or contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury or as matter of opinion (*z*).

As "debts and liabilities provable" are either the "rights of secured or of unsecured creditors," it does not seem easy to see any difference between the two sets of expressions.

[D.]

"*As to the Valuation of Annuities.*"

"Annuities" (if they are not debts, as they are said not to be, save as to their arrears, unless secured by bond (*a*)) would seem to be comprised, if at all, under

(*x*) Bankruptcy Act, 1869, s. 31.
(*y*) *Ibid.* s. 4.
(*z*) *Ibid.* s. 31.
(*a*) Per Sir J. Cross, 2 Mont. & A. 523.

the large but loose interpretation of "liabilities" given above.

The Lord Chancellor, with the advice of the Chief Judge, may make general rules as to the "valuing of any debts provable in a bankruptcy" (*b*). No such rules have yet (1876) been made, and until such is the case it may be contended that the old principles, practice and rules as to the valuation of annuities still apply (*c*). These are contained in the Bankruptcy Act, 1849, which has been wholly repealed (*d*); so that our practical rule for guidance may be an act which is no longer on the statute book! It is as follows:

(I.)

Annuities certain and absolute.

The Court shall ascertain their value, by whatever assurance secured, regard being had to the original price given for the annuity, deducting the diminution in the value caused by the lapse of time from the grant to the petition for adjudication (*e*).

If the consideration was property, not money, the price paid by the grantee shall not be the criterion of value, but the market price (*f*). And the improved value of the property shall be taken into account (*g*).

(II.)

Contingent Annuities.

It was no objection to the proof of an annuity under the Bankruptcy Act, 1849, that it was contingent, if it was capable of valuation (*h*); but if it was for, or

(*b*) Bankruptcy Act, 1869, s. 78.
(*c*) *Ibid.*
(*d*) 32 & 33 Vict. c. 83.
(*e*) Bankruptcy Act, 1849, s. 175.
(*f*) *Ex parte Saxe*, 2 Deac. & Ch. 172.
(*g*) Robson, 170.
(*h*) *Ex parte Van Heythuysen*, 2 Mont. & Ayr. 519.

depended on, too uncertain a period or event to be valued, no proof was admissible (*i*).

If an annuity be a "liability," the mode of valuing contingent annuities is the same as that of valuing future contingent liabilities (*k*).

[E.]

"*And future and contingent Liabilities.*"

The mode of valuation is to make an estimate of their value according to the rules of the court (*l*) (*i. e.* of the court constituted by the Bankruptcy Act, 1869 (*m*)) for the time being in force, as far as applicable, and where not applicable, at the discretion of the trustee in bankruptcy, from whom an appeal lies to the court (*n*).

As no rules of the court have been yet (1876) made which are applicable, the valuation is made by the trustee.

Why the rules of bankruptcy as to the valuation of contingent "*debts*" is not adopted by the sub-section, it is not easy to see. Has that word dropped out *per incuriam*, or intentionally? They seem, however, not to be within the sub-section, and if not, still must be valued as heretofore in Chancery. For, although the phrase "*Debt provable in bankruptcy*" includes liabilities (as we have seen) (*o*), it by no means follows from thence that the converse of the proposition is true, and that "liabilities" include "debts," especially having regard to the careful way in which those expressions are distinguished, if not separately defined, throughout in the Act; which, had they been synonymous, would have been superfluous or bad draughtsmanship.

(*i*) *Parker* v. *Ince*, 4 H. & N. 53.
(*k*) *Infra*.
(*l*) Bankruptcy Act, 1869, s. 31.
(*m*) *Ibid.* s. 4.
(*n*) *Ibid.* s. 31.
(*o*) *Supra*, p. 8.

Chapter II.

STATUTES OF LIMITATION INAPPLICABLE TO EXPRESS TRUSTS.

36 & 37 Vict. c. 66, sect. 25, sub-sect. 2.

> "*No claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of trust, shall be held to be barred by any Statute of Limitations.*"

This sub-section introduces no new "rule of law," although it extends the former rule, *i. e.*, the saving of express trusts contained in 3 & 4 Will. 4, c. 27, s. 25 (which was limited to land, including leaseholds and rent), to all kinds of property; moreover, it does directly what the Act of William did in an oblique, cumbrous way.

An express, or as it is sometimes termed a direct, trust, is one declared by some written instrument (or in the case of personalty even by parol (*a*)), and is not to be made out by circumstance or evidence (*b*).

[A.]

"*Against his Trustee.*"

As the sub-section is, substantially, a re-enactment of section 25 of 3 & 4 Will. 4, c. 27; which section neither it nor the Limitations Act, 1874 (*c*), repeal, further than they are inconsistent with it (and they do not appear to be inconsistent with it, as to the point now

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(*a*) *Milroy* v. *Lord*, 4 De G., F. & J. 274.

(*b*) *Petre* v. *Petre*, 1 Drew. 393.

(*c*) 37 & 38 Vict. c. 57.

under consideration), it is necessary to consider sect. 25 of the Act of William (which must be read with this sub-section) and the previous law generally.

(I.)

Cestui que Trust *v.* Purchaser of Land or Rent.

"Where any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him" (*d*).

The principal object of the above section being to declare that express trusts shall not be within it, the circuitous and anomalous mode adopted for effectuating this simple object—and that (be it observed) only by implication—is to declare that the right of the *cestui que trust* against his trustee shall be deemed to have accrued at, and not before, such and such a time, and then shall accrue in favour—not of such trustee but of—another person! One would naturally have expected that, if the *right against the trustee* was not to accrue *till* a particular time, the act would have gone on to say that after such time it should be held to accrue against him. Not a bit of it. The scene is suddenly changed. The section thenceforward becomes a *purchaser's protection section*, and *he* only is to be safe at the end of twenty years, and the trustee is left to the operation of the general law.

(*d*) 3 & 4 Will. 4, c. 27, s. 25.

The section of the Act of William relates only to purchasers for value with notice, and to land or rent; for purchasers for value without notice, at least if they had the legal title (which on a purchase from a trustee they generally had, and the possession of which, now that equitable titles (*e*) are to be universally recognised, may be less material) and did not purchase from trustees of charities (*f*), were always safe, irrespectively of statute, as the favourites of equity, from its doctrine of notice (*g*).

(II.)

Cestui que Trust *v.* Purchaser of Personalty.

(1.)

Choses in Possession.

Money and bank notes (*h*) may not be followed into the hands of a purchaser to whom they have passed in circulation, unless he had notice (of the trust).

Other personal chattels can be recovered from a purchaser for value [*semble*, even if without notice] if he did not buy them in market overt (*i*).

Market overt is, in London, strictly confined to shops in the City (*k*).

The purchaser "may be called to account by the *cestui que trust*, notwithstanding his *length of enjoyment*, subject to the rules of equity against affording relief to stale demands" (*l*), or on grounds irrespective of the Statutes of Limitation (*m*).

(*e*) 36 & 37 Vict. c. 66, s. 24.

(*f*) Tudor's Charitable Trusts (2nd ed.) 333.

(*g*) *Basset* v. *Nosworthy*, Rep. Temp. Finch, 102.

(*h*) Cases cited in Lewin on Trusts (4th ed.) 584.

(*i*) *Ibid.*

(*k*) Williams, P. P. (3rd ed.) 323.

(*l*) Hill on Trustees, 525.

(*m*) What those are, *infra*.

(2.)

Choses in Action.

A purchaser of a *chose in action*, whether with or without notice, takes it subject to the equities (*n*) affecting it, and therefore to the claim of the *cestui que trust* (*o*).

But the protection of want of notice extends to a purchaser of a bill of exchange (*p*).

And the same rule would seem to apply, as to the time within which *cestui que trust* may sue him, as in choses in possession.

In both classes of cases, *i. e.*, of choses in action and in possession, it is apprehended "*length of enjoyment*," as stated above, means the length of time prescribed by the Statutes of Limitation, *i. e.*, six years, if the remedy was in equity (by analogy to the legal remedy of detinue or trover) (*q*), in the case of choses in possession, or six or twenty years in the case of choses in action, if they be debts, according as they are simple contract (*r*) or specialty (*s*).

(III.)

Cestui que Trust *v.* Trustee and Volunteers from him.

(1.)

As against the *trustee* in possession (or *volunteers* from him with or without notice in possession) of land (*t*).

Cestui que trust may "follow" the land in their hands, without limit as to time (*u*), subject to the rules in equity (*x*), irrespective of the Statutes of Limitation (*y*).

(*n*) What these are, Chap. VI.
(*o*) See cases cited in Lewin, 560.
(*p*) *Dawson* v. *Prince*, 2 D. & J. 41.
(*q*) 21 Jac. 1, c. 15.
(*r*) *Ibid.*
(*s*) 3 & 4 Will. 4, c. 42.
(*t*) *Mansell* v. *Mansell*, 2 P. Wms. 678.
(*u*) Lewin, 561.
(*x*) What those are, *infra*.
(*y*) *M'Donnell* v. *White*, 11 H. Lds. 579.

By "following the land" is meant claiming to have the trusts of it performed.

(2.)

As against the trustee not in possession (having wrongfully aliened land to a purchaser, with or without notice, or to a volunteer, with or without notice) (*z*).

Subject to the rules of equity (*z*), irrespective of the Statutes of Limitation (*a*), the *cestui que trust* may—

(i.)

Compel him to purchase other lands of equal value to be settled on the like trusts (*b*).

(ii.)

Take the sale moneys, if any, with interest (*c*).

(iii.)

Have the present estimated value of the lands, allowing for any increase of price caused by improvements subsequent to the alienation (*d*).

(3.)

As to *any* property.

Subject to the rules of equity irrespective of the Statutes of Limitation (*e*), *cestui que trust* may have—

(i.)

Account from the trustee (if the property is capable of account).

(ii.)

Delivery by the trustee (or what is tantamount thereto), if possible, and improperly withheld.

(iii.)

Compensation from trustee personally for any loss the trust estate has sustained by any breach of trust.

(iv.)

If the trustee, with intent to defraud, convert or appropriate the property to his own use, or dispose of or

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(*z*) *Mansell* v. *Mansell*, 2 P. Wms. 678.

(*a*) What these are, *infra*.

(*b*) 2 P. Wms. 678.

(*c*) 2 P. Wms. 678.

(*d*) *Ibid.*

(*e*) What these are, *infra*.

destroy it, he is liable to three years' penal servitude or fine, or two years' imprisonment, with or without hard labour (*e*).

[**B.**]

"*Held on an Express Trust.*"

Implied and constructive trusts were never excepted out of the statute of Will. 4, and the plea of lapse of time, whether the statutory period or less, is more readily admitted when put in by such trustees, their position being usually, to a certain extent, adverse to the *cestui que trust* (*f*).

Implied trusts have been well defined (*g*), as those presumed from the intention of the parties and nature of the instrument, and as otherwise known as resulting or presumptive.

Constructive trusts, as those raised by the construction of a court of equity, where the legal owner cannot also enjoy the beneficial interest without violating some principle of equity (*h*).

But, these distinctions carrying us back to the somewhat interminable further questions, *when* and *where* are such principles violated, *what* are those principles, *when* and *where* and *how* are the "intentions" of parties and the "nature of the instrument" to be ascertained, the best definition of constructive and implied trusts for our present purpose is, perhaps, the simple one, "*such as are not express*" (as defined above).

[**C.**]

"*Or in respect of any Breach of such Trust.*"

As there can be no (rightful) claim against a trustee without some violation of duty [*i. e.*, without some

(*e*) 20 & 21 Vict. c. 54.
(*f*) Hill, 250.
(*g*) *Ibid.* 55.
(*h*) *Ibid.*

"breach of trust"], these words seem superfluous, and hardly to carry the sub-section further than it would have been carried without them.

Before 36 & 37 Vict. breaches of express trust were not within any Statute of Limitations (*h*), although equity adopted fully the analogy of the statutes, and refused relief to a party who lay by long after notice of a breach of trust.

And the same rule has been applied against the personal representative of a deceased express trustee who has committed a breach of trust (*i*).

> When, therefore, a breach of trust is called, as it is (*k*), a debt, it is only so *sub modo*, and for some purposes, *e. g.* in the administration of assets: for were it so absolutely, it would be within the Statutes of Limitation, which concern debts, and nowhere expressly except breaches of trust. Their exemption, therefore, was under the general principles of equity.

As implied and constructive trusts themselves were not excepted out of any Statute of Limitations, and are not now; so neither were, nor are, breaches of them.

[D.]

"*Shall be held to be barred by any Statute of Limitations.*"

The Statutes of Limitation are: 21 Jac. 1, c. 15; 3 & 4 Will. 4, cc. 27, 42, and (after January 1, 1879) 37 & 38 Vict. c. 57. The last-named Act, if it continues law, will have an important bearing on the sub-section under consideration, and will (it may be contended) make time run in favour of an express trustee, or at least against

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(*h*) *Phillipo* v. *Munnings*, 2 M. & C. at p. 315.

(*i*) *Obee* v. *Bishop*, 1 D., F. & J. 137.

(*k*) Lewin, 590.

land subject to the trusts within it, notwithstanding 36 & 37 Vict. c. 66; for it enacts that (*l*):—

> "No action, suit or other proceeding shall, after January 1st, 1879, be brought to recover any sum of money, or legacy charged upon, or payable out of, land or rent, *secured by express trust*, or any arrears of rent or any interest in respect thereof, except within the time within which the same would be recoverable if there were no such trusts."

The sub-section leaves open to the trustee all modes of defence (other than the statutes) which were open to him before. These are: 1. Acquiescence; 2. Waiver; 3. Staleness of Demands; 4. Laches.

(I.)

Acquiescence.

Acquiescence is either (*m*) *direct*, as where one now complains of an act, which he fully knew, and expressly approved of; or *indirect*, as where one having a right to property stands by, and sees another dealing with it in a way inconsistent with such right, and makes no objection, while such dealing is in progress (*n*).

The Court will not visit a trustee with the consequences of a breach of trust committed without the sanction or direction of the *cestui que trust*, if (when it comes to his knowledge) he has acquiesced, and obtained the benefit of it, for a long period (*o*).

Length of time, where it does not operate as a statutory or positive bar, operates only as evidence of acquiescence (*p*).

A bar by acquiescence involves lapse of time, and a bar

(*l*) Sect. 10.

(*m*) *Kent* v. *Jackson*, 14 Beav. p. 584.

(*n*) *Duke of Leeds* v. *Earl Amherst*, 2 Phill. 117.

(*o*) *Griffiths* v. *Porter*, 25 Beav. 236.

(*p*) Shelford's Real Property Acts, 7th ed. 228.

by both are not two, but one (and the same) proposition (*q*). A reversioner may acquiesce in a breach of trust before his interest comes into possession; though *time does not run* against him, nor is he bound to assert his title, till then (*r*).

[The decision last referred to must be considered as qualifying Mr. Hill's observation, that the "acquiescence of a *cestui que trust* in remainder will not be binding on him during the continuance of the preceding life estate, for, until his own title accrues in possession, he has no immediate right to interfere in the administration of the estate" (*s*). The authority cited by Mr. Hill (*t*) for this position was a peculiar case standing on its own rights.]

It would seem then, as if acquiescence might be a bar within the statutory period, even in express trusts.

The equitable doctrine of acquiescence has a statutory validity given it, for the Act of Will. 4 provides [and the provision is not one of those prospectively repealed by the Limitations Act, 1874], that—

"Nothing in this Act [3 & 4 Will. 4, c. 27] shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of *acquiescence or otherwise*, to any person whose right to bring a suit *may not be barred by virtue of this Act*" (*u*).

(II.)

Waiver.

Of which it has been said, that it is difficult to know what its legal effect is (*x*); and that it is not to be confounded with acquiescence (*y*).

(*q*) Shelford's Real Property Acts, 7th ed. 228.

(*r*) *Life Association of Scotland* v. *Siddall*, 3 D., F. & J. 73.

(*s*) Pp. 251, 546.

(*t*) *Bennett* v. *Colley*, 5 Sim. 181; 2 M. & K. 225.

(*u*) Sect. 27.

(*x*) *Stackhouse* v. *Barnston*, 10 Ves. 466.

(*y*) Lewin, 568.

A *mere* waiver signifies nothing more than an *expression of intention* not to insist upon the right (in question), and will not in equity bar that right without some consideration (of money or money's worth) (*z*).

Unlike acquiescence, it seems not, necessarily, to involve time.

(III.)

Staleness of Demands.

"Though no time runs as between *cestui que trust* and trustee in express trusts, so as to bar the remedy of the beneficiary; yet, with respect to claims made by him against his trustee, the general rule of equity that encouragement is not to be given to stale demands is equally applicable" (*a*) (in those as in other cases).

The rule was thus laid down by Lord Camden: "A court of equity, which is never active against conscience or public convenience, has always refused its aid to stale demands, where the party has slept on his right, and acquiesced for a great length of time" (*b*).

It is not easy to see what this rule exactly amounts to. Staleness involves time. Does the rule mean that it does not begin to tell in favour of the trustee until after the statutory period (in the case of land twenty years, as the law now is, or in the case of chattels personal six years), but that it then begins to be imputed against the *cestui que trust, although the trust may be then still subsisting?*

(IV.)

Laches.

This also involves time; the mere lapse of which, or delay in suing (it has been said), *per se*, disentitles a party (*c*) *in certain cases;* (*e. g.*, purchases by trustees and

(*z*) 10 Ves. 466.

(*a*) Per Lord Westbury, *M'Donnell v. White*, 11 H. L. Cas. at p. 579.

(*b*) *Smith v. Clay*, 3 B. C. C. 638 (n.).

(*c*) Lewin, 572.

other constructive trusts, where *laches* for less than the statutory period will bar). But, *generally*, mere lapse of time is no bar, though an ingredient, with other circumstances, for drawing inferences unfavourable to one who has lain by (in the case of land) twenty or nearly twenty years (*d*).

Public convenience has been suggested as the ground for holding *laches* a bar (*e*). If so, the legislature having prescribed the shortest time within which the public will suffer inconvenience, *laches* for a shorter time than that statutory period would appear, in the case of express trusts, not to operate as a bar (*f*).

Beyond the statutory period, however, it would begin to tell.

> The distinction between "*laches*," "staleness" and "acquiescence" would seem to be, that *laches* implies lapse of time, accompanied with negligence more or less *crassa;* that "staleness" implies time only (mere lapse of time not necessarily implying negligence), and that time very considerable; whilst "acquiescence" imports, in addition to time, an active concurrence of the will in the thing complained of.

(*d*) *Penny* v. *Allen*, 7 D., M. & G. at p. 426.

(*e*) Lewin, 571.

(*f*) *Archbold* v. *Scully*, 3 H. L. 383.

Chapter III.

ON EQUITABLE WASTE.

36 & 37 Vict. c. 66, sect. 25, sub-sect. 3.

> "*An estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate.*"

[A]

"*An Estate for Life.*"

It does not appear why estates for years are not within the sub-section. Such cases, however, and all other estates not expressly within it, are, if dispunishable at law but not in equity, practically brought within it by sub-sect. 11, for there is then a conflict or variance between the rules of equity and the common law.

Thus, an heir claiming under a resulting trust until the happening of a contingency, who is dispunishable at law, but has been restrained in equity from even legal waste (*a*), is within sub-sect. 11.

And so of a devisee in fee, with a legal (*b*) and, *à fortiori*, an equitable (*c*) executory devise over on his decease without leaving issue, who was dispunishable at law for legal waste, unless he is by the will made

(*a*) *Stansfield* v. *Habergham*, 10 Ves. 272.

(*b*) *Turner* v. *Wright*, 2 D., F. & J. 247.

(*c*) 10 Ves. 277.

impeachable for it (as he may be), but who might not commit equitable waste (*d*).

[It is not easy to understand, therefore, why sub-sect. 3 was necessary at all, or why it should be framed on so narrow a basis as it is.]

[B.]

"*Without Impeachment of Waste.*"

(I.)

By operation of Law.

As where termor for years *sans* waste settles the term on A. for life (without more). A. is dispunishable for waste (*e*), and therefore would seem within the sub-section.

So, of tenant in tail *après possibilité* of issue extinct, who is a tenant for life (*f*), and dispunishable at law (*g*).

Tenant in tail *après, &c.* is where one is tenant in tail special, and he from whose body the issue was to spring dies without any, or his issue become extinct (*h*).

So, of tenant for lives renewable for ever (without more), who even if dispunishable at law (*i*), might not, though expressly *sans* waste, commit equitable waste (*k*).

(II.)

By express Exemption.

(1.)

Absolute.

(Of which nothing more need here be said.)

(2.)

Modified.

The modification amounting, according to its stringency, either to absolute impeachability, (as where

(*d*) *Blake* v. *Peters*, 1 D., J. & Sm. 345.

(*e*) *Bridges* v. *Stephens*, 2 Sw. 150 (n.).

(*f*) 1 Bl. Steph. 3rd ed. 251.

(*g*) 2 D., F. & J. 247.

(*h*) 1 Bl. Steph. 251.

(*i*) *Coppinger* v. *Gubbins*, 3 J. & L. 397.

(*k*) *Pentland* v. *Somerville*, 2 Ir. Ch. Rep. 289.

"voluntary waste" is excepted,) (*l*) or to such a power as a prudent owner in fee, anxious to preserve an estate for his children, would exercise; as where the exception is of "spoil or destruction, or *voluntary* or permissive waste" (*m*).

[In the last-named case the same prohibition of "voluntary" waste, as in *Garth* v. *Cotton*, did not lead Sir J. Romilly to the same conclusion as Lord Hardwicke.]

[C.]

"*Any legal Right to commit Waste.*"

Waste at law, or legal waste, was a substantial injury done by a limited legal owner of land not dispunishable for waste, in rightful possession, to the inheritance thereof (*n*). *Privity of estate*, therefore, between him who commits, and him who complains of, the waste was essential, and distinguished (*o*) waste from trespass. This distinction, though the modern tendency of decisions has been to relax it, has run through all the cases (*p*). And inasmuch as trees, which are not timber, are not part of the inheritance, there is no such thing as waste at law in them (*q*).

[Except perhaps in fruit trees (*r*), or in trees for shelter or protection of banks, or in germins (*s*).]

[*I. e.* young plants which if old enough would be timber.]

But (*semble*) equity will not allow him the property in them if wrongfully cut (*t*).

(*l*) *Garth* v. *Cotton*, 1 Tud. L. C. (Eq.) 524.

(*m*) *Vincent* v. *Spicer*, 22 Beav. 380.

(*n*) Kerr on Injunctions, 3rd ed. 238.

(*o*) See *infra*, Ch. VIII.

(*p*) *Lowndes* v. *Bettle*, 33 L. T., N. S. (Ch.) 451.

(*q*) 18 Eq. 311.

(*r*) Craig on Trees, 14, 127.

(*s*) 18 Eq. 311.

(*t*) *Ibid.*

[Timber are trees useful for building (*u*). Ash, oak and elm, of twenty years, everywhere (*x*), (and by local custom, other trees), if not too old (*y*). In some places the age for timber is more than twenty years, and the test, not age at all, but girth (*z*).]

[Timber *estates* are those cultivated merely for the produce of saleable timber, which is cut periodically (*a*). Felling of timber on such estates by a tenant impeachable is not waste (*b*).]

[D.]

"*Of the Description known as Equitable Waste.*"

As the Act abolishes the legal power of a tenant for life *sans* waste to commit "equitable waste," the old definition of that phrase, viz. the excessive use by him of his *legal power* (*c*), no longer seems to apply.

Another definition of it, that it is such waste as a prudent owner would not commit in the management of his own property (*d*), has been objected to, at least in connection with ornamental timber (*e*), on the ground that every tenant *sans* waste is bound by the taste (or want of it) of any absolute owner planting it or leaving it standing for ornament. It may therefore, perhaps, be best defined as such waste (by a tenant *sans* waste, whether legal or equitable, the court interfering more readily in case of a *trust* for ornament (*f*)) as is *unconscientious* in a court of equity (*g*). *Unconscientious* waste, in the eyes of a court of equity, is any thing tending to

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(*u*) Co. Litt. 53a.
(*x*) 1 Cruise, Dig. 116.
(*y*) *Honywood* v. *Honywood*, 18 Eq. 309.
(*z*) *Ibid.*
(*a*) *Ibid.*
(*b*) *Ibid.*
(*c*) Kerr on Injunctions, 268.
(*d*) Campbell, C., in *Turner* v. *Wright*, 2 D., F. & J. at p. 243.
(*e*) Turner, L. J., in *Ford* v. *Tynte*, 2 D., J. & Sm. at p. 131.
(*f*) *Marker* v. *Marker*, 9 Hare, 1.
(*g*) *Aston* v. *Aston*, 1 Ves. sen. at p. 265.

the destruction, or wanton spoliation (*h*) of the land. The wantonness is inferred from the character and extent of the act, and a malicious *animus* need not be proved (*i*). A court of equity would also restrain mere legal waste, either to support the legal right in urgent cases, or because legal process was from some technical impediment unavailable; and thus might be obliged to determine the legal question, what is, or is not, waste (*k*).

(I.)

Tests of Equitable Waste (by a Tenant *sans* Waste).

1.

The court considers whether there are special circumstances affecting the conscience (*l*) (of the wrongdoer).

2.

In such considerations the intent (of the donor of the power to commit waste) is chiefly regarded (*m*).

3.

Trivial unconscientious waste is disregarded (*n*).

(II.)

Acts of Equitable Waste (by a Tenant *sans* Waste).

1.

To strip or pull down (*o*) a mansion.

2.

To pull down a farmhouse (*p*).

3.

To cut ordinary timber.

"Before it was his day" (*q*) (*i. e.*, before possession).

(*h*) *Piers* v. *Piers*, 1 Ves. sen. 522.

(*i*) 2 D., F. & J. 234.

(*k*) Craig on Trees, 24.

(*l*) *Micklethwait* v. *Micklethwait*, 1 D. & J. at p. 524.

(*m*) *Ibid.*

(*n*) *Piers* v. *Piers*, 1 Ves. sen. 522.

(*o*) *Vane* v. *Lord Barnard*, 2 Vern. 738.

(*p*) *Aston* v. *Aston*, 1 Ves. sen. 265.

(*q*) *Lady Evelyn's case*, cited 3 Freem. 55.

If the estate is thereby stripped (*r*).

If cut in an unhusbandlike way.

[*I. e.* in an improper way (*e. g.* if too young (*s*), or over-ripe (*t*), or at unseasonable times of the year (*u*)).]

If planted to protect or shelter mansion (*x*).

If thereby a wood is grubbed up (*y*).

4.

To cut ornamental timber or ornamental trees, though not timber (*z*).

[I do not find that "timber-like" trees (*a*) differ essentially from "timber."]

Provided

They are planted for pure ornament, *i. e.* not for profit (*b*).

Although

Planted by himself (*c*).

Distant, and separated from mansion by another's grounds (*d*).

Ornamental only to gardens (*e*), park (*f*), rides or drives.

[If *near* a ride or drive. The whole wood will not be within the protection (*g*).]

Planted to exclude objects from view (*h*).

The mansion, which they adorned, has been pulled down, if intended to be rebuilt (*i*).

(*r*) 1 Tudor, Lead. Cas. in Equity, 749.

(*s*) *Pentland* v. *Somerville*, 2 Ir. Ch. Rep. 289.

(*t*) *Perrot* v. *Perrot*, 3 Atk. 95.

(*u*) *Hole* v. *Thomas*, 7 Ves. 590.

(*x*) *Chamberlayne* v. *Dummer*, 1 B. C. C. 166, n. 3.

(*y*) *Aston* v. *Aston*, 1 Ves. sen. 264.

(*z*) Craig, 24.

(*a*) For a grant of them, see 27 Beav. 603.

(*b*) *Hallivell* v. *Philips*, 4 Jur., N. S. 607. Joyce, Injunctions, vol. I., p. 138, has made this appear an authority the other way, by inserting "not."

(*c*) *Marquess Downshire* v. *Sandys*, 6 Ves. 110.

(*d*) *Coffin* v. *Coffin*, Jac. 71.

(*e*) *Hallivell* v. *Philips*, 4 Jur. N. S. 407.

(*f*) 1 B. C. C. 166.

(*g*) *Wombwell* v. *Bellasyse*, 6 Ves. 110 (n.).

(*h*) *Day* v. *Merry*, 16 Ves. 375 a.

(*i*) *Micklethwait* v. *Micklethwait*, 1 D. & J. at p. 524.

Unless he cuts

To cure, by producing uniformity, gaps by tempest (*l*).

To thin them (*m*).

To prevent their being injurious to the house (*n*), as by hindering the growth of other trees.

For repairs, or sale, the settlor having done so (*o*).

In due course of husbandry (*p*).

5.

To cut underwood at unreasonable times (*q*).

6.

To cut saplings maliciously, as, and for the purposes of, timber (*r*).

[*I.e.* trees not fit for, but which would become, timber (*s*).]

7.

To dig brick, gravel, or stones, so as wantonly to destroy the inheritance (*t*).

8.

To open and dig new mines, in a wanton and malicious way (*u*).

[Yet every mining operation is, *pro tanto*, a destruction of the property (*x*).]

(III.)

Tests of Ornament.

1.

The *taste* and intent of settlor, irrespective of the character of the trees (*y*).

[This intent is less difficult to ascertain in trees

(*l*) *Lord Mahon* v. *Earl Stanhope*, 3 Madd. 523 n.

(*m*) ——— v. *Copley*, 3 Madd. 525, n.

(*n*) *Campbell* v. *Allgood*, 17 Beav. 623.

(*o*) *Ford* v. *Tynte*, 2 D., J. & Sm. 133.

(*p*) *Halliwell* v. *Philips*, *ubi sup.*

(*q*) *Hole* v. *Thomas*, 7 Ves. 589.

(*r*) *Ibid.*

(*s*) 1 B. C. C. 107, 167.

(*t*) *Bishop of London* v. *Web*, 1 P. Wms. 527.

(*u*) Bainbridge on Mines, 3rd ed. p. 80.

(*x*) *Ibid.* 81.

(*y*) *Marquess Downshire* v. *Sandys*, 6 Ves. 110.

planted, than in those left standing, for ornament (*z*).]

2.

He must have *dedicated* them to ornament (*a*).

[Such dedication presumed, if near a mansion (*b*).

But a dedication of part is not a dedication of the whole of a wood (*c*).]

The measure of damages due for the cutting is the damage done to the inheritance (*d*).

[Ξ.]

Interest in Equitable Waste.

The subject of the interest in the property wasted, though not strictly within this sub-section, is too closely connected with it to be passed over.

In declaring the title to equitable waste, equity has been said (*e*) to follow the doctrine of law as to legal waste. That doctrine is, that it casts the right to the waste on the owner of the first vested estate of inheritance *in esse at the time of the waste done*, who may accordingly seize the wasted property (*f*).

[Timber money is realty, if nothing is done by the owner of the inheritance to convert it into personalty (*g*).]

But equity secedes from this doctrine in the case of legal waste; and acting on the principle that *no man shall obtain advantage by his own wrong* (*h*), not only if the owner of the first existent estate of inheritance

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(*z*) *Lushington* v. *Boldero*, 6 Madd. 149.

(*a*) *Ford* v. *Tynte*, *ubi supra*.

(*b*) *Micklethwait* v. *Micklethwait*, 1 D. & J. 524.

(*c*) 6 Ves. 110 *d* (n.).

(*d*) *Bubb* v. *Yelverton*, 10 Eq. 465.

(*e*) Craig, 140.

(*f*) *Udal* v. *Udal*, Aleyn. 81.

(*g*) *Field* v. *Brown*, 27 Beav. 90.

(*h*) 15 Beav. 5.

(subject to prior contingent estates of inheritance) be (*l*), or collude with (*m*), the wrongdoer, excludes the wrongdoer from the proceeds of the waste, either capital or income (*n*), but will order them to be invested on the same trusts as the land, so as to follow the uses of the settlement (*o*).

And equity follows the same course if the waste be equitable (*p*); and will not prefer a vested to a contingent inheritance, unless the former be heir apparent (*q*).

[*I. e.* one who, if he lives long enough, must become entitled in possession (*r*).]

Equitable waste is a *breach of trust*, and the assets of the wrongdoer will be answerable for it (*s*).

[F.]

Interest, in Equity, of Tenant for Life *sans* waste, in Waste; in rightful Fellings; and in Windfalls.

(I.)

In Waste by prior Tenant.

The Law of Waste to Buildings is the same as of Waste to Trees (*t*).

There seems no direct decision that a tenant *sans* waste is entitled, except during the *privity* (*u*) of his estate (*v*), *i. e.* till he comes into possession, which he never may (*x*); while the property of the thing wasted

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(*l*) Craig, 140.

(*m*) *Garth* v. *Cotton*, 1 Tud. L. C.

(*n*) 15 Beav. 6.

(*o*) *Honywood* v. *Honywood*, 18 Eq. 309.

(*p*) *Ibid.*

(*q*) *Bagot* v. *Bagot*, 32 Beav. 509.

(*r*) *Ibid.*

(*s*) *Ormonde* v. *Kynnersley*, 5 Madd. 369.

(*t*) *Lewis Bowles' case*, 11 Co. 79.

(*u*) Erroneously called "*pendeney*," Johns. 525.

(*v*) 11 Co. 79.

(*x*) Craig, 149.

must be in some one *eo instanti* the wrongful act is done (*y*), and that person is the owner of the inheritance.

(II.)

In rightful Fellings of Timber.

A rightful felling is one by a court or by a trustee if adopted by the court (*z*), or by a tenant impeachable of a timber estate (*a*), and (of course) is not waste.

The court will, on application by a tenant for life impeachable, order *ordinary* timber to be cut when it is decaying (*b*), or will not improve (*c*), or injures other timber (*d*), but not merely because it is ripe (*e*), and may direct the proceeds to be paid to trustees approved by it, or into the Bank of England or Ireland and applied (*f*)—

1.

In purchasing or redeeming land tax or incumbrances on the settled lands, or on lands subject to the same uses, or—

2.

In purchasing other lands to be similarly settled, or—

3.

In payment to person absolutely entitled.

The court has power to cut *ornamental* timber, or trees not timber, *e. g.*, where they make a house unhealthy from their proximity (*g*).

This power, and (except where it has been extended by the Settled Estates Act) its power to cut ordinary timber, is under its ordinary jurisdiction.

The capital of the proceeds of rightful fellings belongs absolutely to the first tenant for life *sans* waste,

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(*y*) *Gent* v. *Harrison*, Johns. 525.
(*z*) *Waldo* v. *Waldo*, 12 Sim. 112.
(*a*) What is, *supra*, p. 25.
(*b*) *Phillips* v. *Barlow*, 14 Sim. 263.
(*c*) *Tooke* v. *Annesley*, 5 Sim. 235.
(*d*) *Hussey* v. *Hussey*, 5 Madd. 44.
(*e*) *Seagram* v. *Knight*, 2 Ch. 628.
(*f*) 19 & 20 Vict. c. 120, s. 23.
(*g*) Cases cited, Kerr, 280.

whether legal (*h*) or equitable (*i*), if prior, in the limitations of the settlement, to the first estate of inheritance (*k*), (prior tenants, though impeachable, taking a life interest in such proceeds): except in timber estates (*l*), where the fellings, being regarded as annual profits, belong absolutely to the tenant impeachable (*m*).

(III.)

In rightful Fellings, by prior Tenant impeachable, of Trees not Timber (*n*).

The felling, or thinning, of trees which are not timber, by a tenant impeachable, is not (with the exceptions before mentioned (*n*)) waste at law, and therefore the legal property in their proceeds is in him (*o*).

And so of thinnings (by such a tenant) of trees, which, though not timber, would become timber; if done to preserve and improve timber trees (*p*).

But trees, not timber, may be wrongfully cut by him (*q*), and *semble*, the rule of timber wrongfully cut would then apply (*r*).

(IV.)

In Windfalls, *i. e.* Trees severed by Storm or Tempest.

These being the act of God, are no Injury, and therefore no Waste.

(1.)

Windfalls of *sound* timber belong (as between tenant for life and remainderman; who stand in the same relation as lessee and lessor (*s*)), to the remainderman, if

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(*h*) *Waldo* v. *Waldo*, 12 Sim. 107.

(*i*) *Lord Lorat* v. *Duchess of Leeds*, 2 Drew. & Sm. 75.

(*k*) *Gent* v. *Harrison*, Johns. 517.

(*l*) What are, *supra*, p. 25.

(*m*) *Honywood* v. *Honywood*, 18 Eq. 309.

(*n*) *Supra*, p. 24.

(*o*) *Pidgeley* v. *Rawlins*, 2 Coll. C. C. 275.

(*p*) *Honywood* v. *Honywood*, 18 Eq. 309.

(*q*) *Ibid.*

(*r*) Craig on Trees, p. 127.

(*s*) *Ibid.* 23.

entitled in fee, or in tail (*u*), or if he is tenant for life *sans* waste (*x*). If the tenant is for life impeachable, they belong to the first vested estate of inheritance (*y*), with (perhaps) a life interest in the produce to the tenant for life (*z*), subject to the question (which Mr. Craig is inclined to answer in the negative) whether the produce should be invested and accumulated for an ulterior tenant for life, if any, *sans* waste (*a*).

2.

Windfalls of unsound timber belong to the tenant for life (*b*).

3.

Windfalls of trees not timber, whether sound or unsound, belong to the tenant for life; for "as he may cut, he may pick up" (*c*).

(*u*) Craig, 23.
(*x*) *Lewis Bowles' case*, 11 Co. 79.
(*y*) *The Welbeck case*, 2 P. Wms. 240; 3 P. Wms. 267.
(*z*) *Lushington* v. *Boldero*, 15 Beav. 7.
(*a*) Craig, 124, 149.
(*b*) *Ibid.* 123.
(*c*) *Ibid.*

Chapter IV.

ON MERGER AND EXTINGUISHMENT.

36 & 37 Vict. c. 66, sect. 25, sub-sect. 4.

"*There shall not, after the commencement of this Act,*" (i.e. *Nov.* 1875 (*a*)) "*be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity.*"

[**A.**]

"*Any Merger.*"

Or rather, "any legal merger." Legal merger, or merger at law, is the annihilation of one vested legal estate (not necessarily in land) in another greater vested legal estate in the same property, by reason of their meeting in one and the same person, without any intervening estate (*b*).

By "greatness" of an estate is meant either its quantity or quality (*c*).

"Quantity" relates to its duration or degree.

"Quality" relates to its nature or incidents (*d*), *e. g.*, whether it is in possession or in reversion. The latter is greater in quality than the former, though it be less in quantity (*e*).

The estates may so meet—

(I.)

By act of the Party,

1.

In the same right.

2.

In a different right (*auter droit*).

Auter droit comprises the relation of husband and

(*a*) 37 & 38 Vict. c. 83.

(*b*) 3 Preston's Conveyancing, 3rd ed. 6.

(*c*) Preston on Estates, 7.

(*d*) *Ibid.*

(*e*) *Stephens* v. *Bridges*, 6 Madd. 66.

wife (*f*), executor and administrator, and a corporate, as distinguished from an individual, capacity (*g*).

But the relation of trustee and *cestui que trust* is not one of *auter droit* (*h*).

(II.)

By act, or operation, of Law; but in the same right only.

[B.]

"*By operation of Law only.*"

These words seem to confine the sub-section to the cases secondly above named (viz. estates meeting in the same right by *act of law*), though it does not appear why the sub-section is so limited.

All other cases of merger at law, however, not covered by this sub-section, in which there is no merger in equity, are covered by sub-sect. 11. It will be necessary, therefore, to consider them also.

[C.]

"*Of any Estate.*"

This would seem to exclude from the sub-section the doctrine of merger as applied to charges, or as it concerns mortgages and their priorities; but as those cases are also covered by sub-sect. 11 (where there is any variance between the rules of law and equity upon them), they also are here to be considered (*i*).

[D.]

"*The beneficial Interest in which would not be deemed to be merged or extinguished in Equity.*"

Extinguishment at law is (as distinguished from *merger* at law) the annihilation of a *collateral* subject, right or

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(*f*) *Infra*, p. 38.
(*g*) 6 Cruise's Dig. 4th ed. 483.
(*h*) *Ibid.*
(*i*) See *infra*, p. 39—42.

interest in the estate out of which it is derived (*f*). And there may be extinguishment at law by operation of law, *e. g.*, where a rent-charge in fee devolves upon the tenant in fee of the inheritance on which it is charged (*g*). Such extinguishment at law is not within this sub-section, but will, where there is a variance between the rules of law and equity, be within sub-sect. 11.

The definition above given of *legal* extinguishment, or extinguishment at law, seems to apply to extinguishment in *equity* also.

Where, then, and in what cases, is there "no merger or extinguishment in equity of the beneficial interest in an estate?" For that is the test, to which all questions of merger at law by operation of law only are to be henceforth brought.

The non-intervention of an intermediate estate, so essential in order to effect merger at law, is immaterial in equity. *There*, estates without any intervening estate may, on the one hand, meet without merging: whilst, on the other, they may meet and merge, though there be an intervening estate (*h*).

(I.)

Estates meeting in the same right.

1.

Where one having a particular legal estate, coupled with a trust, subsequently acquires a legal estate in remainder of equal or greater extent (or rather quantity), either through his own act,

[*E. g.*, trustee of a term *purchases* the inheritance (*i*).]

(*f*) 3 Preston's Conveyancing, 9.
(*g*) 6 Cruise's Dig. 468.
(*h*) Lewin on Trusts, 4th ed. 469.
(*i*) *Nurse* v. *Yerworth*, 3 Sw. 608.

or by act or operation of law :

[*E. g.*, the freehold descends on, or is devised to, the trustee of a term (*k*).]

[A devise not being an act of the party (at least of the devisee (*l*)).]

2.

Where one has the legal fee in his own name, and for his own benefit, and a particular legal estate is subsequently acquired by him as trustee, either by his own act,

[*E. g.*, heir or devisee in fee has a term assigned to him in trust.]

or devolves upon him in trust (*m*) :

[*E. g.*, devisee in fee has assented to the bequest of a trust term of which he is executor.]

3.

Where the equitable fee and a particular legal estate meet in the same person :

[*E. g.*, to A. in fee in trust for B. in fee, who has a legal term (*n*).]

4.

Where the legal fee and a particular equitable estate meet in the same person :

[*E. g.*, a legal term in A. in trust for B., who acquires the immediate legal reversion in fee, whether by descent or conveyance (*o*), whether beneficially or as trustee.]

In the two last examples there was no merger at law, because it did not recognize equitable estates—therefore there is no conflict. Now that it will recognize those estates under sect. 24 of the Judicature Act, 1873, the equitable rule, it is presumed, will still remain.

5.

Trust of a fund in Court for husband for life, then

(*k*) *Saunders* v. *Bournford*, Finch, 424.

(*l*) 5 B. & C. 110.

(*m*) Hill on Trustees, 235.

(*n*) *Ibid.*

(*o*) 6 Cruise's Dig. 481.

for wife for life, then for son absolutely. Husband and son assign their interests to wife, in order that, her estate being converted into one in possession, she may assign it to the son (*n*). This is no merger at law of the wife's reversion (being an assignment of an equitable *chose in action*) (*o*); but had it been, equity would not permit it (*p*).

(II.)

Estates meeting in different rights.

1.

Trustee of term takes to wife the freeholder (*q*).

2.

Freeholder takes to wife the trustee of a term (*r*).

3.

Freeholder leases, and becomes the executor or administrator of lessee (*s*).

4.

Executor or administrator of a term becomes the devisee or heir.

There is no merger in the above cases even at law (*t*), the estates meeting by act, not of the party, but of the law (*e. g.*, the marriage, probate, &c.); therefore this sub-section does not apply, nor does sub-sect. 11; for there is no conflict between the rules of law and equity; Equity (*semble*) following here the law.

5.

Executor or administrator of term purchases the inheritance (*u*).

Here there was a merger at law (though not by operation of law), but not in equity (*x*): henceforth the equitable rule will prevail by sect. 11.

(*n*) *Whittle* v. *Henning*, 2 Phil. 731.
(*o*) *Infra*, Ch. VI.
(*p*) Phill. 731.
(*q*) *Thorn* v. *Newman*, 3 Sw. 603.
(*r*) *Ibid.*
(*s*) 3 Preston's Conveyancing, 309, 529.
(*t*) Bac. Abr. Lease, R.
(*u*) 6 Cruise, 480.
(*x*) Bro. Abr. Executors, pl. 174; Extinguishment, pl. 57.

[E.]

Merger, or (more properly) Extinguishment, of Charge in Estate.

A charge (*z*) will sometimes be merged at law, which will be preserved in equity, and will sometimes merge in equity, when it will subsist at law (*a*).

Here is a two-fold conflict, which will henceforth be removed by adopting, by virtue of sub-sect. 11, the equitable doctrine in all cases. It becomes necessary, therefore, only to consider that doctrine.

The cases where there is no conflict, *i. e.* in which both at law and in equity there will either be merger or no merger, are not within our subject.

[Mr. Tudor divides the cases into: (1.) Those where the owner of the estate becomes owner of the charge; and (2.) Where the owner of the charge becomes owner of the estate. The distinction, apparently, is one of the order of time (*b*).]

The guiding equitable *principles* are, that where the qualities of debtor and creditor are united, there arises a confusion of rights, which extinguishes the two credits (*c*); that mergers are odious, and never allowed except for special reasons (*d*); that in all cases of a charge merging in equity, it must be perfectly indifferent to the party in whom the interests have united whether the charge should, or should not subsist (*e*); and that the test of merger or no merger is the intention of the owner of the charge (*f*) at the time of acquiring it, the presumption of which intention is different

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(*z*) *Forbes* v. *Moffat*, 18 Ves. 384.

(*a*) As in *Astley* v. *Milles*, 1 Sim. 298.

(*b*) Tudor's Real Property, L. C., 2nd ed. p. 837.

(*c*) *Ibid.*

(*d*) *Phillips* v. *Phillips*, 1 P. Wms. 41.

(*e*) *Forbes* v. *Moffat*, 18 Ves. 384.

(*f*) *Astley* v. *Milles*, 1 Sim. 341.

according to the nature of his interest in the estate. It is necessary, therefore, to consider the equitable rule with reference to that difference.

(I.)

Where the estate (even of a lunatic (*g*)) is in fee simple (or a tenancy in tail in possession, for his power of acquiring the fee simple places him on the same footing (*h*)).

Rule in Equity.

The charge will merge (*i*) (for it is generally no use to one to have a charge on his own estate), though secured by a legal term, and so not merging at law (*k*).

Exception to Rule.

Unless an intention (*l*), express or implied (*m*), that it should not merge, be shewn.

Where no express intention is proved, the Court considers what is most advantageous to the owner (*n*).

(II.)

Where the estate is for life, with or without an ulterior remainder in fee (*o*); or a tenancy in tail in remainder (*p*), or restrained from alienation (*q*); or a tenancy, subject to be defeated by an executory devise (*r*).

Rule in Equity.

The presumption is, that the party paying off the charge paid it for his own benefit, because (at least in the case of a tenant for life) of the "scantiness of his estate" (*s*), though he has not kept it alive at law by

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(*g*) 2 Ves. jun. 261.

(*h*) *Paul* v. *Dudley*, 15 Ves. 173.

(*i*) *Forbes* v. *Moffat*, 18 Ves. 384.

(*k*) *Astley* v. *Milles*, 1 Sim. 341.

(*l*) *Ibid.* 344.

(*m*) Fisher on Mortgages, 2nd ed. 784.

(*n*) *Ibid.*

(*o*) *Wyndham* v. *Earl of Egremont*, Ambl. 763.

(*p*) *Horton* v. *Smith*, 4 K. & J. 628.

(*q*) *Shrewsbury* v. *Shrewsbury*, 3 B. C. C. 120.

(*r*) *Drinkwater* v. *Combe*, 2 S. & S. 340.

(*s*) 5 D. M. & G. 610.

assigning it to a trustee (*t*). The presumption, however, hardly, if at all, arises on paying off a bond (*u*).

Exceptions to Rule.

Unless it is a matter of indifference to him, whether it is kept alive or not (*x*).

A distinction is admitted to exist, in the case of a tenant in tail in remainder, who has become entitled in possession, between the case where he pays off the charge himself, and where he becomes entitled to it without any act on his part. In the latter case it would be indifferent to him whether the charge sinks or not; and so the presumption in favour of merger is increased (*y*).

Unless the intent be shown (as it may be) to exonerate the inheritance by the payment (*z*). The burden of this proof does not lie upon the limited owner (*a*).

[F.]

The Charge considered as regards its Priority over other Incumbrances.

Rule in Equity.

Primâ facie, a debt charged on an estate and paid off by the purchaser of such an estate, whether he be the *mortgagee* owner of the debt or not, merges as against other incumbrancers of whom he had notice; and to keep it alive, so as to acquire priority over them, he should, in prudence, have it assigned to a trustee for himself (*b*), though the intent to do so without an assignment is sufficient (*c*). And the fact that merger

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(*t*) *Morley* v. *Morley*, 5 D. M. & G. 610.

(*u*) *Johnson* v. *Webster*, 4 D. M. & G. 474.

(*x*) *Forbes* v. *Moffat*, 18 Ves. 384.

(*y*) *Horton* v. *Smith*, 4 K. & J. at p. 628.

(*z*) *Astley* v. *Milles*, 1 Sim. 341.

(*a*) Fisher on Mortgages, 2nd ed. 790.

(*b*) *Toulmin* v. *Steere*, 3 Mer. 210.

(*c*) Lewin, 471.

would give priority to other charges, raises a presumption sufficient to rebut merger (*d*).

And so if the purchaser be the *mortgagor* himself, buying from the mortgagee (who sells under his power of sale) and paying it off with the purchase money (*e*). He pays it off for the benefit of the inheritance, and consequently of those who at that time have an interest therein (*f*).

Exceptions to Rule.

The extinguishment will not preclude the mortgagee purchaser from setting off a debt (due to him from the subsequent incumbrancer) against the charge of the latter (*f*).

And the intention (of all parties joining in a new mortgage) to preserve the old debt will prevent its extinguishment (*g*).

So if the mortgagee be the *devisee* of the equity of redemption, the charge will not merge (*h*). And the same principle seems to apply where the equity of redemption *descends* on the mortgagee (*i*).

[G.]

The Merger of Securities.

The law of the merger of one *security* in another of a higher nature, as well as the exemptions from such merger (*k*), appear to be the same at law and in equity. Such cases, therefore, are not within sub-sect. 11 of sect. 25, and not being cases of "*estates*," are not within this sub-section. They are, therefore, not within the scope of this work.

(*d*) *Richards* v. *Richards*, Johns. 766.

(*e*) *Otter* v. *Vaux*, 6 De G., M. & G. 638.

(*f*) *Hayden* v. *Kirkpatrick*, 34 Beav. 645.

(*g*) *Phillips* v. *Gutteridge*, 4 De G. & J. 531.

(*h*) *Forbes* v. *Moffat*, 18 Ves. 384.

(*i*) 5 Jarm. on Conveyancing (Sw.) 3rd ed. 455.

(*k*) Fisher on Mortgages (2nd ed.), 802.

Chapter V.

SUITS BY MORTGAGORS ENTITLED TO POSSESSION.

36 & 37 Vict. c. 66, sect. 25, sub-sect. 5.

> "*A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipts and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent, or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person.*"

This adopts no existing rule of equity, but lays down a new rule, the scope of which is sufficiently apparent from the words of the sub-section.

"*A mortgagor*," *i. e.* where the mortgage is a legal one, and whether the lease be prior or subsequent to the mortgage.

"*Trespass or other wrong relative thereto*," *i.e.* to the land. This would seem to include breaches of covenant.

It is not easy to see why an express power to distrain is not given him by the Act (it has been implied (*a*)) for rent arrear.

(*a*) *Trent* v. *Hunt*, 9 Exch. 14.

"*Unless the cause of action arise upon a lease or other contract made by him jointly with any other person,*" *i. e.* other than himself.

Therefore a lease by himself and the mortgagee will be within the exception. This was not in the earlier prints of the Bill: and the law in such cases will be somewhat narrowed from what it was. Hitherto a lease made by mortgagor and mortgagee was held not a joint demise, and the mortgagor might, after the mortgage money was paid off, sue in his own name (*b*).

So, if in such a lease the covenants were entered into severally with the mortgagor and mortgagee, the former might have sued alone in respect of them (*c*).

So, if in such a lease the covenants to pay rent and repair were with the mortgagor only (*d*).

(*b*) *Doe* v. *Adams*, 2 Tyr. 289.

(*c*) *Harold* v. *Whitaker*, 11 Q. B. 147.

(*d*) *Stokes* v. *Russell*, 3 T. R. 678.

Chapter VI.

ABSOLUTE ASSIGNMENTS OF CHOSES IN ACTION.

36 & 37 Vict. c. 66, sect. 25, sub-sect. 6.

"*Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under, and in conformity with, the provisions of the Acts for the Relief of Trustees.*"

[A.]

"*Any absolute Assignment in Writing under the hand of the Assignor of any Debt or other legal Chose in Action.*"

What is an "assignment" within the sub-section? It does not define it, as it ought to have done, for it has no ascertained legal signification. The Trustee Act, 13 & 14 Vict. c. 60, defined "assign" and "assignee."

A *chose in action*, which the Act should also have defined, may be described as personal estate, not in possession, the owner whereof has a right to recover, and can only recover it, by the help of a Court (*a*).

Personal estate in possession is personalty, which in its nature is visible, and actually enjoyed by the owner (*b*), and capable of tangible and corporal delivery (*c*).

Legal *choses in action* are such as, prior to 36 & 37 Vict. c. 66, were recoverable in a court of law, and may, perhaps, be best defined, negatively, as such as are not equitable—

Viz.: debts, including those secured by promissory note, bill of exchange, bond, judgment, mortgage, or charter party (as freight), indorsed bills of lading, life and marine policies, debts due to bankrupts (*d*).

Freight is the money due (under a charter party) for the hire of a ship, or for the conveyance of goods therein (*e*). A charter party is assignable (*f*), but can hardly itself be called a *chose in action*.

Equitable *choses in action*, prior to 36 & 37 Vict. c. 66, were recoverable in a court of equity only, and are principally the following:—

(1.)

The beneficial interest—

(*a*) Williams on Executors, 5th ed. 699.
(*b*) *Ibid.*
(*c*) Wms. P. P. 4.
(*d*) 32 & 33 Vict. c. 71, s. 5.
(*e*) *Mangles* v. *Dixon*, 1 M. & G. 437.
(*f*) *Ibid.* 738.

(i.)
in personalty under a will or intestacy;

(ii.)
in stock standing in another's name;

(iii.)
in money in the Supreme Court.

[Shares in statutory companies generally seem not to be *choses in action* (*h*), and it has been decided (*i*) that those in companies within 7 & 8 Vict. c. 110, are not *choses in action* within the "reputed ownership" section (15) of the Bankruptcy Act, 1869.]

(2.)
Judgments, if enforceable in equity.

(3.)
(Where a legal debt has been settled in trust, or is held in trust),—the beneficial interest in it of *cestui que trust.*

(4.)
(Where the trust in a legal debt, *e.g.*, the interest of *cestui que trust* last named, has been assigned),—the interest therein of such assignee.

Prior to the 36 & 37 Vict. c. 66, the assignment of legal *choses in action*—(except of those which by custom or by special statute were assignable at law as bills of exchange (*k*) and of lading if endorsed (*l*), promissory notes (*m*), bail (*n*) and replevin bonds (*o*), railway (*p*) and exchequer (*q*) bonds, life (*r*) and marine (*s*) policies and bankrupt's *choses in action* (*t*)),

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(*h*) Lindley on Partnership, 3rd ed. 683.
(*i*) *Ex parte* the Union Bank of Manchester, 12 Eq. 354.
(*k*) Wms. P. P. 5.
(*l*) 18 & 19 Vict. c. 111.
(*m*) 3 & 4 Anne, c. 9; 7 Anne, c. 25.
(*n*) 4 Anne, c. 16, s. 20.
(*o*) 11 Geo. 2, c 19.
(*p*) 8 & 9 Vict. c. 16.
(*q*) Addison on Contracts, 284.
(*r*) 30 & 31 Vict. c. 144.
(*s*) 31 & 32 Vict. c. 86.
(*t*) 32 & 33 Vict. c. 71, s. 32.

—and the assignment of all equitable *choses in action* were known as "equitable assignments." Such a term will henceforth be true only of equitable *choses in action*, the mode of transfer of which seems wholly untouched by the Act, since the words "debt or other legal *chose in action*," which would, perhaps, have stood better thus—"legal debt or *chose in action*,"—confine the Act to legal *choses* only: notwithstanding that the word "trustee," occurring twice in the sub-section, points *primâ facie* to a case in which the assignor may be only the equitable owner.

The mode of transfer under the Act, however, seems permissive only, not imperative. Transfers therefore of legal *choses in action*, it may be contended, *may*, while those of equitable choses *must*, be made as before the Act. The question also arises whether legal *choses*, which were previously assignable at law by the modes indicated by their special enactments, may not be legally assigned by a mere writing under the sub-section, which is universal in its language, and, being subsequent in date, would override prior Acts.

The transfer, therefore, of both legal and equitable choses, independently of the Act, must be here considered.

(I.)

Absolute voluntary Assignments.

A voluntary assignment is not necessarily fraudulent; but if it is, it is void as against creditors of the assignor (*u*), though they may not have obtained judgment (*x*).

Large indebtedness, though not amounting to insolvency, would amount to fraud (*y*).

(*u*) 13 Eliz. c. 5.

(*x*) *Adams* v. *Hallett*, 6 Eq. 468.

(*y*) See Cases Collected, 1 Tud. L. C. Eq. 284.

Legal and equitable *choses in action*, then, are validly transferable without valuable consideration (so at least as to pass an equitable right and beneficial interest in them).

(1.)

By Declaration of Trust.

I. e., by any deed (*z*) or writing (*a*), executed or signed by the owner, declaring or directing (or any verbal declaration or direction (*b*) by him) that he the transferor (*c*) or (in the case of equitable *choses in action*) his trustee (*d*), or that the debtor (*e*) (the debtor assenting to and acting on the direction) (*f*) do and shall hold the *chose in action* in trust for the donee.

Neither the word "trust," or "confidence" (*g*), nor any form of words expressly constituting a trust (*h*), is necessary. The words attributed to the present Master of the Rolls (*i*), that "for a man to make himself a trustee, there must be an expression *of an intention* to become a trustee," must be taken as meaning, not that such an expression is *per se* sufficient (for a valid declaration), but that there must be at least that, together with more; for a mere intention seems not enough (*k*).

It has been held that any instrument affecting to be an out-and-out assignment of the transferor's whole legal or equitable interest to, or in trust for, the donee, however invalid to pass the legal interest (*l*) (and in the case

(*z*) *Ex parte Pye*, 18 Ves. at p. 142.
(*a*) *Lambe* v. *Orton*, 1 Drew. & Sm. 125.
(*b*) *Milroy* v. *Lord*, 4 De G., F. & J. 264.
(*c*) *Ex parte Pye*, 18 Ves. 140.
(*d*) *Tierney* v. *Wood*, 19 Beav. 330.
(*e*) *M'Fadden* v. *Jenkyns*, 1 Ph. at p. 157.
(*f*) *Ibid.*
(*g*) *Kekewich* v. *Manning*, 1 De G., M. & G. at p. 194.
(*h*) *Miller* v. *Harrison*, 5 Ir. Rep., Eq. at p. 343.
(*i*) In *Richards* v. *Delbridge*, 18 Eq. 11.
(*k*) *Dipple* v. *Corles*, 11 Hare, 183.
(*l*) *Richardson* v *Richardson*, 3 Eq. 686.

cited the *chose in action* was legal) would constitute a valid trust. But this decision, however weighty, must, for the reasons about to be adduced, not now be relied on as law.

(2.)

By actual transfer (to Donee or Trustee for him).

Neither the word "assign," nor any particular language (*m*) is necessary, so long as the formalities required by law for the conveyance of the particular description of property be observed.

The authority of *Milroy* v. *Lord* (*n*) (which was weakened by *Richardson* v. *Richardson*, *Morgan* v. *Malleson* (*o*) and *Miller* v. *Harrison*), and of *Warriner* v. *Rogers* (*p*), which followed it, must now be considered as restored by *Richards* v. *Delbridge* (*q*), followed by *Heartley* v. *Nicholson* (*r*), and is said by the present Master of the Rolls to contain the true law on the subject of the distinction between valid declarations of trust, which will be upheld, and imperfect gifts or assignments, which will *not* be upheld, in equity — a distinction which long ago was said (*s*) to have pervaded all the cases, but which later decisions had made no longer definable or tenable.

The distinction is thus epitomized in the case to which the Master of the Rolls refers us: "In order to render a voluntary settlement valid, the settlor must have done everything which, according to the nature of the property, was necessary to be done in order to transfer it and render the settlement binding upon him.

(*m*) *Miller* v. *Harrison*, 5 Ir. Rep., Eq. at p. 324.
(*n*) 4 De G., F. & J. 264.
(*o*) 10 Eq. 475.
(*p*) 16 Eq. 340.
(*q*) 18 Eq. 6.
(*r*) 19 Eq. 233.
(*s*) 18 Beav. 292.

He may do this, by actually *transferring* it to the persons for whom he intends to provide, and the provision will then be effectual: and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for these purposes; and if the property be personal, the trust may be *declared* in writing or by parol. But to render the settlement binding, one or other of these modes must be resorted to, for there is no equity in this Court to protect an imperfect gift" (*t*).

For a disposition which is attempted to be made, and is made ineffectually, as a transfer, cannot take effect, or be upheld, as a declaration of trust; for that would be contrary to the intention, which was, that the whole ownership, legal or equitable, should be parted with (*u*), and no trusteeship remain in the transferor, or in any one else, for the donee.

(II.)

Absolute Assignments for Value.

The sub-section is, as has been said, permissive, not compulsory, and does not include partial assignments, which *must* therefore, as absolute assignments for value *may*, be made as before the Act.

Previously to the Act, if it were a legal *chose in action*, which was so transferred, assent on the part of the debtor, and some valuable consideration for such assent, must have been proved, in order to give the assignee a remedy at law (*x*); because such an agreement amounts only to a simple contract; though if the transfer had been by deed, with a power of attorney, no such assent

(*t*) *Milroy* v. *Lord*, 4 De G., F. & J. 264.

(*u*) *Heartley* v. *Nicholson*, 19 Eq. 233.

(*x*) *Tibbits* v. *George*, 5 Ad. & Ell. at p. 116.

or consideration was necessary at law (*y*). In equity no such assent or consideration was necessary (*z*), either to the transfer of a legal, or of an equitable, *chose in action;* any words showing an intent to transfer were, and are, sufficient (*a*); the transfer operating as an agreement for value, which equity would specifically perform, when the transferor was in a condition to transfer (*b*). This variance will no longer occur; but the equitable rule will prevail (*c*).

[B.]

"*Of which Express Notice in Writing shall have been given.*"

Where the notice is to trustees, the relation of trustee and *cestui que trust* must have been actually created, in order to give the party so giving notice priority (*d*).

A "stop order" is necessary (where the *chose in action* is stock or funds standing to the account of the Paymaster General (*e*) on behalf of the Chancery Division), to *perfect* the title of the assignee, and restrain the transfer or payment thereof without notice to him, and is equivalent to notice by him (*f*):

But will not prevail against a prior notice before the fund was in Court (*g*).

Stop orders ancillary to common law charging orders (*h*) seem henceforth unnecessary (*i*).

Stop orders restraining the payment to a judgment debtor of cheques in Court (*k*), seem not within the order last referred to.

(*y*) *Walsh* v. *Whitcomb*, 2 Esp. 565.

(*z*) *Ex parte South*, 3 Sw. 392.

(*a*) *Ryall* v. *Rowles*, 1 Ves. sen. 348.

(*b*) *Adderley* v. *Dixon*, 1 S. & S. 607.

(*c*) See sub-sect. 11.

(*d*) *Bullen* v. *Plunkett*, 1 J. & H. 443.

(*e*) 35 & 36 Vict. c. 44, s. 24.

(*f*) *Stuart* v. *Cockerell*, 8 Eq. at p. 609

(*g*) *Livesey* v. *Harding*, 23 Beav. 141.

(*h*) *Hulkes* v. *Day*, 10 Sim. 41.

(*i*) Judicature Act, 1875, Ord. XLVI. r. 1.

(*k*) *Hulkes* v. *Day*, 10 Sim. 41.

A *distringas* may operate as notice where there is no trustee (*l*), and is obtainable by any one claiming stock transferable at the Bank of England, standing in another's name; and if served on the Bank, with notice not to permit the transfer of such stock or payment of the dividends thereon, prevents (*m*) such transfer or payment for eight days. A general restraining order may be also obtained against the Bank or any public company in respect of stock or shares therein (*n*).

Notice of assignment of a legacy unassented to should be given to the executor, not to the trustees of the will (*o*).

Notice to a trustee, to be good, must be given to one not interested in concealing the assignment (*p*).

Notice should be formal (*q*), and not given to strangers to the fund (*r*).

The mere omission to give notice, if no other assignee has given it, does not *per se* invalidate an assignment (*s*).

(I.)

Notice on absolute voluntary Assignments.

Notice to the donee (*t*) or his trustees, if any, was unnecessary before the Act, and seems so still; and so was, and is, his or their acceptance of the gift (*u*).

Unless the assignment be under the sub-section, notice (by the assignee) to the debtor is not necessary, as between the assignor and assignee, whether the assignment be of a legal (*x*) or equitable (*y*) *chose in action*, although it *is* necessary to make the assignee's title safe as against *some* third persons, *i.e.*, as against

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(*l*) *Etty* v. *Bridges*, 2 Y. & C. C. C. 486.

(*m*) 5 Vict. c. 5, s. 5; Judicature Act, 1875, Ord. XLII. r. 2.

(*n*) 5 Vict. c. 5, s. 4.

(*o*) *Holt* v. *Dewell*, 4 Hare, 447.

(*p*) *Browne* v. *Savage*, 4 Drew. 635.

(*q*) *Brown's Trusts*, 5 Eq. 88.

(*r*) *Lloyd* v. *Banks*, 4 Eq. 222.

(*s*) *Hobson* v. *Bell*, 2 Beav. at p. 23.

(*t*) *Tate* v. *Leithead*, Kay, 658, where the donee was *cestui que trust.*

(*u*) *Re Way's Trusts*, 2 De G., J. & S. 365.

(*x*) *Paterson* v. *Murphy*, 11 Hare, 88.

(*y*) 1 Tudor's L. Cas., 4th ed.

the assignor's trustee in bankruptcy if it be a trade debt (*z*), or his assignees for value (*a*); but not as against other volunteers from him (*b*); for as between them there are no equities (*c*), *i. e.*, none of them has an equity to be asserted against the other.

But if the *puisne* volunteer, first giving notice, has without fraud realized the fund, the Court will not take it from him (*d*).

As against judgment creditors, the case seems to stand irrespective of notice: *e. g.*, as against a prior judgment creditor with a prior charging order on stock, the *volunteer* would take only what the judgment debtor then had to give (*i. e.*, subject to the charging order). As against a prior volunteer the *judgment creditor* would take only what the debtor had to give (*i. e.*, subject to the volunteer).

If the assignment be to trustees, their omission to give notice does not affect the title of the *cestui que trust* (*e*). Where the assignment is of an equitable *chose in action*, notice to the trustees of the assignor, and their acceptance of any new trust created by the assignments, is unnecessary (*f*).

(II.)

Notice on absolute Assignments for Value.

(1.)

As between Assignor and Assignee.

Notice need not, except under the Act, be given to the debtor (*g*) or trustees (*h*) of the assignor. Payment to him, however, before notice is a good payment (*i*).

(*z*) 1 Ves. 348; B. A. 1869, s. 15.

(*a*) As to whom, *infra*, p. 56.

(*b*) *Justice* v. *Wynne*, 12 Ir. Ch. Rep. 289.

(*c*) *Ibid.*

(*d*) 12 Ir. Ch. Rep. at p. 300.

(*e*) *Fortescue* v. *Barnett*, 3 M. & K. 36.

(*f*) *Tierney* v. *Wood*, 19 Beav. 330.

(*g*) *Dearle* v. *Hall*, 3 Russ. 1.

(*h*) *Ibid.*

(*i*) Kay, 719.

(2.)

As against general Assignees.

A particular assignee is one for value or voluntary.

A general assignee is a trustee in bankruptcy or under a general assignment for payment of debts.

(i.)

Notice of the bankruptcy by the trustee in bankruptcy—for bankruptcy is not notice to the world (*j*)—and of the assignment by other general assignees, must be given to the debtor or trustee, to gain priority (*k*).

(ii.)

Notice, by a particular assignee for value, to the debtor or trustee must be given before the bankruptcy (*l*) or other general assignment, to give him priority, if the debt was owing to the bankrupt in his trade (*m*); but not otherwise.

(3.)

As between particular Assignees for Value *inter se*.

The priority of the notices they give does not necessarily ascertain the priorities of their assignments, *e.g.*, if the subsequent assignee first giving notice took his assignment *with* notice (*n*).

Notice which is necessary as against subsequent assignees to *maintain* (*o*), is also necessary against prior assignees to *acquire* (*p*), priority.

Semble, priority of notice is a "better equity" than that in favour of the prior assignee arising from the doctrine that the subsequent one takes "subject to equities."

Priority *of the dates* of their assignments is the last equity resorted to (*q*).

(*j*) *Sowerby* v. *Brooks*, 4 B. & Ald. 523.

(*k*) *Re Barr's Trusts*, 4 K. & J. 219.

(*l*) *Ex parte Caldwell*, 13 Eq. 188.

(*m*) Bankruptcy Act, 1869, s. 15.

(*n*) 12 Ir. Ch. Rep. at p. 308.

(*o*) *Hobson* v. *Bell*, 2 Beav. 17.

(*p*) *Dearle* v. *Hall*, 3 Russ. 1.

(*q*) *Rice* v. *Rice*, 2 Drew. 85.

(4.)

As between Assignees for Value and Judgment Creditors.

A prior judgment, with a charging order subsequent to the assignment, though prior to notice by the assignee, is postponed (*p*).

[The case last cited, however, did not turn upon the doctrine of notice (*q*).]

(5.)

As between Assignees for Value and Volunteers.

(i.)

Subsequent Volunteers.

Notice is unnecessary, because the volunteer *takes* subject to equities (*r*), and *has* none; his want of notice, therefore, does not *protect* him; and his being the first to give notice would not give him priority (*s*).

(ii.)

Prior Volunteers not giving Notice.

A subsequent assignee for value without notice (but not one with notice (*t*)), has priority, if he *gives* notice (*u*).

(iii.)

Prior Volunteers first giving Notice.

The volunteer has priority, even if the subsequent assignee for value had no notice; the gift being complete (*x*).

[C.]

Retention of the Instrument of Assignment, and of the Security.

(1.)

On Absolute voluntary Assignments.

If the transfer of a legal *chose in action* is valid in other respects, tested as above, delivery of the instru-

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(*p*) *Scott* v. *Lord Hastings*, 4 K. & J. 633.

(*q*) *Supra*, p. 54.

(*r*) 2 Tud. L. C. Eq. 811.

(*s*) *Justice* v. *Wynne*, 12 Ir. Ch. Rep. at p. 305.

(*t*) *Ibid.*, at p. 304.

(*u*) *Ibid.*

(*x*) 1 Tud. L. Cas. Eq. 268.

ment of assignment (if any) to the donee, or his trustee (if any), is immaterial as between the assignor and assignee (*y*); and also, it would seem, as between the assignee and third persons (*e. g.*, the assignor's trustee in bankruptcy), if the *chose in action* were one contracted in the course of his trade or business. The retention of *the security*, however, though not material as between the assignor and assignee, may be so as between the assignee and third persons (*z*); for it may enable the assignor to commit a fraud, and obtain false credit, by remaining, as far as the nature of the property permits him, in possession, and to deceive subsequent assignees for value (*a*); and so may raise the question which of two innocent persons should suffer, and which has the "better equity"

A "better equity" means, that according to the rules of equity it will *prefer* A. to B.; therefore equal equities are impossible, except when the Court refuses to interfere (*b*).

In assignments of book-debts (*c*) and of equitable *choses in action*, notice alone is sufficient.

(2.)
On absolute Assignments for Value.

A purchaser will seldom part with his money without delivery of the instrument of assignment and security (so that it will rarely become a question how far the retention postpones his assignment); but if he does, it will (if unexplained) be negligence in him, disentitling him to favour in equity, and the law will be the same as on retention of the security on voluntary assignments.

(*y*) *Re Way's Trusts*, 2 De G., J. & S. 365.
(*z*) *Rice* v. *Rice*, 2 Drew. 77.
(*a*) 1 Atk. 177.
(*b*) *Rice* v. *Rice*, 2 Drew. 77.
(*c*) 1 Atk. 177.

[C.]

"*Subject to all Equities which would have been entitled to Priority over the right of the Assignee if this Act had not passed.*"

(I.)

Absolute Voluntary Assignments.

(1.)

The assignee takes subject to equities, as on assignments for value (*d*).

(II.)

Absolute Assignments for Value.

Rule in Equity.

The rule is that the assignee, though without notice, takes subject to all equities (*e*).

An "equity" is such a liability as *the property* (*f*) is subject to in the hands of the assignor at the time of the assignment (whether that liability is to the debtor or any other third person) in the eyes of a court of equity, or even of law (*g*).

The chief equities, to which the property is so subject, are—

(i.)

Set-off claimable by the debtor (*h*).

(ii.)

The state of account between the assignor and assignee; *e. g.*, partial or complete payment (*i*).

(iii.)

Lien of a solicitor on a fund recovered by him (*k*).

(iv.)

Lien of an executor on share of residuary legatee (*l*).

(*d*) *Infra*.

(*e*) 2 Tudor's L. Cas. Eq. 811.

(*f*) 2 Spence, Eq. Jur. (Index) "Choses in Action."

(*g*) *Holmes* v. *Kidd*, 3 H. & N. 891.

(*h*) *Cavendish* v. *Greaves*, 24 Beav. 163.

(*i*) *Ord* v. *White*, 3 Beav. 366.

(*k*) *Haymes* v. *Cooper*, 33 Beav. 431.

(*l*) *Willes* v. *Greenhill*, 29 Beav. 376.

(v.)

Calls due from the assignor to a company (*m*).

(vi.)

Stoppage *in transitu* (*n*).

[*I. e.*, the right of a consignor on the bankruptcy of consignee to "stop" goods whilst on their passage, *i. e.*, to direct the carrier to deliver to him the consignor, instead of to consignee or his assignee (*o*).]

(vii.)

Equities of a wife (*p*).

Exceptions to Rule.

(1.)

If the owner of the equity release the assignor, by writing (*q*) or by conduct (*r*), or mislead the assignee (*s*).

(2.)

A promissory note, or bill of exchange (*t*) endorsed, not overdue.

An overdue bill or note is not within the exception (*x*), if the equity on it be one which is not collateral to the bill or note, but attaches itself to it (*y*).

E. g., the defeasible nature of the assignor's title (in consequence of possible payment by the debtor (*z*)), or actual payment of an accommodation bill (*a*).

I. e., one drawn, accepted or indorsed, without consideration, to benefit some other party (*b*).

(*m*) *Re N. Assam Tea Co.*, 10 Eq. 458.

(*n*) *Spalding* v. *Ruding*, 6 Beav. 376.

(*o*) Wms. P. P. 41.

(*p*) *Infra.*

(*q*) *N. Assam Tea Co.*, 10 Eq. 458.

(*r*) *Re Blakely Ordnance Co.*, 3 Ch. 154.

(*s*) *Mangles* v. *Dixon*, 3 H. L. Cas. 702.

(*t*) 2 Eq. Cas., Abr. 85.

(*x*) *Holmes* v. *Kidd*, 3 Hurl. & N. 891.

(*y*) *Ex parte Swan*, 6 Eq. 344.

(*z*) *Holmes* v. *Kidd*, 3 H. & N. 891.

(*a*) *Cook* v. *Lister*, 13 C. B., N. S. 543.

(*b*) Byles on Bills, 7th ed. 111.

(3.)

A bill of lading endorsed by consignee (*b*).

[A bill of lading is a receipt from the master of a ship for goods put on board for conveyance, stating they are to be delivered to consignee or his assign.]

(4.)

If a contrary intention appear from the contract (*c*).

[D.]

Assignment by Husband of Wife's *Chose in Action* not settled to her separate use.

A husband never assigns her separate estate. She may assign this as a *feme sole*. If she does not, and dies before him, it becomes his own, on taking out administration to her (*d*).

An assignment places the assignee, whether general or particular, only in the situation of the husband, *i. e.*, gives him only a right to reduce into possession, at the time when possession is possible (*e*).

(I.)

Legal *Choses in Action.*

(1.)

Reversionary.

A reversionary *chose in action* is one not immediately recoverable (*f*), or distributable, and therefore one not presently capable of being actually reduced into possession—*e. g.*, a bond debt payable *in futuro*—and does not necessarily presuppose a prior life interest in it existing in some one else.

A wife's reversion is not reduced into possession by assigning to her the prior life interest (*g*), if any.

(*b*) *Rodger* v. *The Comptoir d'Escompte de Paris*, 2 L. R., P. C. 405.

(*c*) *In re Agra and Masterman's Bank*, 2 Ch. 391.

(*d*) *Prondley* v. *Fielder*, 2 M. & K. 57.

(*e*) *Hornsby* v. *Lee*, 2 Madd. 16.

(*f*) Wms. P. P. 310.

(*g*) *Whittle* v. *Henning*, 2 Ph. 731; see Ch. IV.

A *chose in action* is reduced into possession, when something has been done to change the ownership of the property—*e. g.*, payment to the husband or his assignee (*h*).

A general (*i*) or particular (*j*) assignee of the husband takes *nothing* by the assignment, if the husband die before he or the assignee can or does reduce the *chose in action* into possession: but takes *absolutely* (subject to wife's debts (*k*)) if she die before the husband and before reduction is possible, if the husband takes out administration to her.

(2.)

Non-reversionary.

As these are chiefly debts, the principal reduction into possession consists in receiving the money, or obtaining judgment in an action for it.

The intention of reducing into possession by bringing an action is not enough (*l*).

If, therefore, the husband or his assignee die before he or his assignee reduce into possession, the wife surviving is entitled though she joined in the assignment, and the assignee will in equity be a trustee for her (*m*).

A voluntary assignment by the husband of a *chose in action* accrued to him after marriage in right of his wife, if made within two years before his bankruptcy or (unless his solvency independently of that property is proved) ten years before it, is void against the trustee in bankruptcy (*n*).

(II.)

Equitable *Choses in Action.*

(1.)

Reversionary.

The same is law, on particular or general assign-

(*h*) *Purdew* v. *Jackson*, 1 Russ. 1.
(*i*) *Mitford* v. *Mitford*, 9 Ves. 87.
(*j*) *Hornsby* v. *Lee*, 2 Madd. 16.
(*k*) 1 Bright's H. & W. 41.
(*l*) 1 Roper's H. & W. (2nd ed.) 208.
(*m*) 2 Tudor's L. Cas. Eq. 786.
(*n*) 32 & 33 Vict. c. 71, s. 91.

ments, as in legal reversionary *choses in action* (*o*), with this addition, that if reduction into possession becomes possible by reason of the property becoming distributable before the husband and wife die, the assignee is entitled, subject to the wife's equity to a settlement (*p*); or absolutely, if he can obtain payment or transfer from the trustee before the wife institutes her action (*q*).

(2.)

Non-reversionary.

If the wife is entitled absolutely and the reduction is during the husband's life, the assignee, whether general (*r*) or particular (*s*), takes subject to the wife's equity to a settlement.

A wife's equity to a settlement attaches only to her equitable *choses in action*—does not attach as long as they are reversionary (*t*)—attaches on action brought by, or on her behalf, before reduction into possession (*u*)—is personal to her (*x*)—may be waived (*y*) by her—may be barred by a prior adequate settlement (*z*) or by her fraud (*a*) or adultery (*b*)—is usually of one half (*c*), but if husband is bankrupt or has received with her a large fortune, of the whole (*d*)—includes children (*e*), but is gone if she die before decree (now judgment (*f*)).

If the wife is entitled for life, and the reduction is during the husband's life, the assignee, whether

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(*o*) *Supra*, p. 61.

(*p*) Wms. P. P. 307.

(*q*) *Greedy* v. *Lavender*, 13 Beav. 62.

(*r*) *Sturgis* v. *Champneys*, 5 M. & C. 97.

(*s*) *Scott* v. *Spashett*, 3 M. & G. 599.

(*t*) *Osborn* v. *Morgan*, 9 Hare, 432.

(*u*) *Murray* v. *Lord Elibank*, 13 Ves. 1.

(*x*) *Ibid.*

(*y*) *Beaumont* v. *Carter*, 32 Beav. 586.

(*z*) *Spirett* v. *Willows*, 1 Ch. 520.

(*a*) *In re Lush's Trusts*, 4 Ch. 591.

(*b*) *Carr* v. *Eastabrooke*, 4 Ves. 146.

(*c*) 1 Tudor's L. Cas. Eq. 464.

(*d*) *Gardner* v. *Marshall*, 14 Sim. 515.

(*e*) *Johnson* v. *Johnson*, 1 J. & W. 472.

(*f*) *Wallace* v. *Auldjo*, 1 De G., J. & S. 643.

general (*g*) or particular (*h*), takes; the former subject to the wife's equity to a settlement (*i*):

The husband's incapacity to maintain her, proved by his insolvency, raising an equity against the general assignee.

If not reduced into possession during the husband's life, and the wife survive, she is entitled as against both the general (*k*) and particular (*l*) assignee, by her legal right of survivorship.

[Σ.]

Absolute Assignments by a Woman of her *Choses in Action.*

(I.)

Married Woman.

She may, by deed acknowledged, the husband concurring, assign her reversionary *chose in action*, as a *feme sole* (*m*) (and this power seems unaffected by the sub-section under consideration), unless—

(1.)

It were settled (or agreed to be) on her marriage (*n*).

(2.)

The instrument, under which she takes it, restrain her (*o*).

(3.)

The settlement and appointment, under a power in it (*p*), were before 1858.

(II.)

Infant.

A female infant may validly assign a *chose in action*, with approbation of the Chancery Division (*q*). This

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(*g*) *Lumb* v. *Milnes*, 5 Ves. 517.
(*h*) *Elliott* v. *Cordell*, 5 Madd. 149.
(*i*) *Ibid.*
(*k*) *Pierce* v. *Thornely*, 2 Sim. 167.
(*l*) *Ellison* v. *Elwin*, 13 Sim. 309.
(*m*) 20 & 21 Vict. c. 57.
(*n*) Sect. 4.
(*o*) Sect. 1.
(*p*) *Re Butler's Trusts*, 3 Ir. Rep., Eq. 138.
(*q*) 18 & 19 Vict. c. 43; 36 & 37 Vict. c. 66, s. 34 (2).

power seems unaffected by the sub-section under consideration.

[F.]

"*From the date of such Notice.*"

That is, I presume, from the date at which the notice is received.

[G.]

"*Under and in conformity with the Provisions of the Acts for the Relief of Trustees.*"

These, though not mentioned by the sub-section, as they should have been, for they have no ascertained legal signification, seem to be 10 & 11 Vict. c. 96, and 12 & 13 Vict. c. 74 (*s*).

[H.]

"*That such Assignment is disputed by the Assignor.*"

Or rather "that the *validity* of such assignment or title of the assignee is disputed." Unless the assignment were a forgery, the assignor could not dispute *the fact.*

[I.]

"*To interplead concerning the same.*"

That is to say, under the 1 & 2 Will. 4, c. 58 (*t*), and 23 & 24 Vict. c. 126, s. 12 *et seq.* The defendant may apply any time after being served with the writ of summons and before delivery of defence (*u*).

(*s*) Morgan's Ch. Orders, 4th ed. pp. 52—64.

(*t*) *Semble*, amended by 1 & 2 Vict. c. 45, s. 2.

(*u*) Judicature Act, 1875, Ord. I. r. 2.

Chapter VII.

ON UNESSENTIAL STIPULATIONS.

36 & 37 Vict. c. 66, sect. 25, sub-sect. 7.

"*Stipulations in contracts, as to time or otherwise, which would not before the passing of this Act*" (i. e. *its commencement* (*a*); i. e., 1*st November*, 1875 (*b*)) "*have been deemed to be, or to have become, of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in Equity.*"

[A.]

"*Stipulations in Contracts as to Time.*"

The phrase "essence of the contract" has been applied judicially to other cases than those of a vendor and purchaser of real estate (including leaseholds), to which, however, it is primarily and ordinarily applicable. Thus it has been applied to penalties of bonds (*c*), and the reduction of the rate of mortgage interest on punctual payment (*d*).

By "time," as between vendor and purchaser, is meant the time for completion of the contract, or for taking any of the steps towards completion (*e*); *i. e.*,

Delivery and return of the abstract of title;

Objections and requisitions of the purchaser;

Payment of the deposit (*f*) or purchase-money;

Delivery of possession (*g*);

Months, *primâ facie*, mean lunar ones (*h*).

(*a*) 38 & 39 Vict. c. 77, s. 10.
(*b*) 37 & 38 Vict. c. 83.
(*c*) Per Lord Eldon, *Seton* v. *Slade*, 7 Ves. 278.
(*d*) *Ibid.*
(*e*) *Tilley* v. *Thomas*, 3 L. R., Ch. 6.
(*f*) *Boahm* v. *Wood*, 1 J. & W. 420.
(*g*) *Ibid.*
(*h*) Dart, 5th ed. 427.

(I.)

Where Time has been originally stipulated to be of the Essence by the express Agreement of the Parties.

Rule in Equity.

The modern tendency is to make it essential (*i*).

[No particular words are necessary to make it of the essence, if the intention appear (*j*).

Time declared essential for one particular is presumably not so for another (*k*).]

The party claiming time to be essential must "make the point promptly" (*l*).

Exceptions to Rule.

Where it has been waived by—

1.

The subsequent conduct of the parties (*m*); *e.g.*, their going on negotiating for the completion (*n*) of the contract, and proceeding in the purchase, after the time (*o*).

2.

The subsequent agreement of the parties (*p*).

(II.)

Where the Time so fixed is not expressly stipulated (*q*) to be of the Essence.

Rule in Equity.

The Court will, although unreasonable delay will of itself conclude either party, relieve against or enforce specific performance, notwithstanding a failure to keep the dates assigned by the contract either for completion, or for any of the steps towards completion (*r*).

[This is all that is meant when it is said, time is not of the essence in equity (*s*).]

(*i*) Dart, 5th ed. 420.

(*j*) *Hipwell* v. *Knight*, 1 Y. & C., Exch. 401.

(*k*) *Wells* v. *Maxwell*, 32 Beav. at p. 414.

(*l*) *Monro* v. *Taylor*, 8 Hare, at p. 62.

(*m*) Dart, 5th ed. 424, citing 13 Sim. 206.

(*n*) *Webb* v. *Hughes*, 10 Eq. p. 286.

(*o*) For instances of conduct, *infra*.

(*p*) 3 Russ. at p. 119.

(*q*) 32 Beav. at p. 414.

(*r*) *Tilley* v. *Thomas*, 3 Ch. 61.

(*s*) *Roberts* v. *Berry*, 3 De G., M. & G. 284.

Provided

1.

The delay has been unavoidable from the state of the title (*t*).

The vendor may show a good title at or before the decree or investigation in chambers (*u*), or within a reasonable time after (*x*).

2.

The time has been waived (in the opinion of the Court) by—

(i.)

Subsequent agreement of the parties (*y*).

(ii.)

Subsequent conduct, treating time as immaterial (*z*): *e. g.*,

(a.)

Purchaser receiving the abstract after the time for delivery (*a*).

(b.)

Purchaser perusing abstract unnecessarily (*b*).

(c.)

Purchaser retaining the abstract under circumstances which require (*c*) its immediate rejection (*d*).

(d.)

Purchaser not asking for the abstract (*e*), or not soon enough (*f*).

(e.)

Vendor receiving purchaser's requisitions (without reserving his right to object) delivered after the time fixed (*g*).

(*t*) Dart, 422.
(*u*) *Ibid.*
(*x*) *Coffin* v. *Cooper*, 14 Ves. 205.
(*y*) *Robinson* v. *Page*, 3 Russ. 114.
(*z*) 7 Ves. 278.
(*a*) *King* v. *Wilson*, 6 Beav. 124.
(*b*) *Nott* v. *Riccard*, 22 Beav. 307.
(*c*) Mr. Dart says "*prevent*," p. 425.
(*d*) *Seton* v. *Slade*, 7 Ves. 265.
(*e*) *Guest* v. *Homfrey*, 5 Ves. 818.
(*f*) *Jones* v. *Price*, 3 Anst. 924.
(*g*) *Pegg* v. *Wisden*, 16 Beav. 239.

(f.)

Neither party taking any step to quicken the other till it is impossible to complete by the day fixed (*h*).

[Waiver of matters which must long precede completion, is a waiver of the time to complete in (*i*).]

In all cases where equity holds time unessential proper compensation will be given for the delay.

Interest belongs to the vendor, rents to the purchaser, from the day for completion.

Exceptions to Rule.

(Raising a necessary *implication* that time was of the essence (*k*).)

1.

If the nature of the property require the time to be adhered to (*l*); *e.g.*, if it be—

(i.)

A reversion (*m*);

(ii.)

A life annuity (*n*);

(iii.)

A public house (*o*);

(iv.)

Property of an Ecclesiastical Corporation.

Where every day is of consequence, as the vendors may die (*p*).

2.

If the object of the sale require (*q*) time to be adhered to.

E. g., where it is to pay incumbrances, especially if bearing higher interest, out of the purchase-money (*r*).

(*h*) 3 Anstr. 924.

(*i*) Dart, 5th ed. 426.

(*k*) *Parkin* v. *Thorold*, 16 Beav. at p. 65.

(*l*) *Tilley* v. *Thomas*, 3 Ch. 61.

(*m*) *Newman* v. *Rogers*, 4 B. C. C. 390.

(*n*) *Withy* v. *Cottle*, 1 S. & S. at p. 178.

(*o*) *Cowles* v. *Gale*, 7 Ch. 12.

(*p*) *Carter* v. *Dean of Ely*, 7 Sim. 211.

(*q*) Dart, 5th ed. 420.

(*r*) *Tilley* v. *Thomas*, 3 Ch. 61.

3.

If the party insisting on its being essential (the other party having been guilty of delay, and the original time having passed), gives the other reasonable notice (*s*), or unreasonably short notice acquiesced in (*t*), to complete by a given day,—such subsequent time then becomes essential (*u*).

But ceases to be so, if waived by—

(i.)

Subsequent agreement (*x*).

(ii.)

Subsequent conduct (*y*).

All sorts of notice have been held both reasonable and unreasonable (*z*): no rule can be laid down.

4.

Options to purchase,—which are construed strictly (*a*).

5.

If the contract be inequitable (*b*).

E. g., if the purchase-money be unreasonably great or inadequate (*c*).

(III.)

Where no Time has been originally fixed by the Parties.

[This, however, is really a stipulation *other* than as to time.]

What has been said of time not being essential (when fixed), where the delay is owing to the state of the title, applies here *à fortiori*, because the Court has not the express stipulation of the parties to struggle against (*d*).

And the same rule applies where the delay is owing to the conduct of the parties.

(*s*) *Webb* v. *Hughes*, 10 Eq. 281.
(*t*) 16 Beav. at p. 73.
(*u*) *Ibid.* at p. 75.
(*x*) Dart, 5th ed. 424.
(*y*) *Webb* v. *Hughes*, 10 Eq. 281.
(*z*) Cases Collected, Dart, 5th ed. 423.
(*a*) *Brooke* v. *Garrod*, 2 De G. & J. 62.
(*b*) *Whorwood* v. *Simpson*, 2 Vern. 186.
(*c*) 2 Tudor's L. Cas. Eq. 529.
(*d*) Sugd. V. & P. 10th ed. 435.

[B.]

"*Or otherwise.*"

This involves the doctrine of equity as to relief against forfeitures, and penalties, and other cases in which equity will decree compensation for a breach of the stipulation.

(I.)

Forfeitures.

Forfeiture, as connected with contracts, is the result of a breach of, or non-compliance with, the condition of a possibly "hard bargain" (*e*), whereby the party committing such breach loses all interest in the property respecting which the contract has been broken.

Forfeitures, as punishments annexed by law, and therefore not "determined hardly" (*f*), *without contract*, to some illegal act or neglect, are not within this sub-section, nor within sub-sect. 11, because equity will not relieve against them (*g*); and there is no conflict.

(II.)

Penalties.

A penalty, *aliàs* the penal part of a contract, *aliàs* a "*nomine* (*h*) *pœnæ*," is an engagement to pay a sum greater than that which is *actually due*, and than the parties *intended* should be recoverable (*i*), and is a punishment or infliction for not doing something (*j*), and therefore money due on contract cannot be converted into a penalty (*j*).

The question is one of *intention*, to be gathered from a construction of the whole instrument.

(*e*) Per Lord Macclesfield, *Peachy* v. *Duke of Somerset*, 2 Tudor's L. Cas. Eq., at p. 1090.

(*f*) *Ibid.*

(*g*) *Ibid.* 1082.

(*h*) 2 Tudor's L. Cas. Eq , at p. 1085, 1087.

(*i*) *Thompson* v. *Hudson*, 4 L. R., H. L. at p. 15.

(*j*) *Ibid.*, per Lord Westbury, p. 28

The test (in deciding penalty or no penalty) is whether the penalty is *part* of the contract, or is only to secure the performance of the contract; whether the parties mean that one party shall have the right to do the act to which the penalty is attached (paying what is agreed on as an equivalent), or whether he is restricted by the contract from doing that particular act at all (*k*).

If one covenant not to do an act, and a penalty is attached to the doing of it, the penalty does not authorize the doing of the act: and the Court will before the act is done enjoin; if it has been done, the penalty must be paid (*l*).

"Liquidated damages," on the contrary, *aliàs* "stipulated damages," *aliàs* a sum "*in solido*," though larger in amount than the sum actually due, or originally contracted to be paid, are damages fixed on by the parties as the measure of loss to be sustained by the injured party by breach of a contract, and are not in the nature of a penalty (*m*), and will therefore be held essential in equity, and not relieved from.

But neither the words "penalty," nor "penal sum," nor "liquidated damages," are conclusive of the character of the instrument (*n*).

1.

Breaches of, or non-compliance with, the Penal part of a Contract, which are not of the Essence of the Contract in Equity.

(i.)

Non-payment of mortgage principal and interest at the day named (*o*).

[This, however, is really a stipulation as to time (*p*).]

(*k*) *Freneh* v. *Macale*, 2 Dr. & War. at p. 275.

(*l*) *Ibid.*

(*m*) *Rolfe* v. *Peterson*, 2 B. P. C. 436.

(*n*) Cases cited in 2 Tudor's L. Cas. Eq. 1117.

(*o*) Tothill, p. 132.

(*p*) *Supra*, p. 65.

(ii.)

Breach of covenant to insure against fire (*q*).

(iii.)

Penalty on a common money bond (*r*).

(iv.)

Penalty to secure the enjoyment of a collateral object (*s*).

(v.)

Non-payment, even by copyholders, of rent (*t*), or fines (*u*).

Equity relieving, as well where there is a proviso for *cesser* (and where therefore it might be argued there is no longer any thing for the Court to act on (*x*)), as where the proviso is for re-entry (*y*).

[In the case cited, however, the Court laid down no general proposition.]

Provided (in the case of rent)—

(a.)

Lessee pay rent and costs and proceed for relief in equity (*z*) or at law (*a*) (as directed by the Common Law Procedure Acts).

A new lease is in such a case not necessary (*b*).

(b.)

Lessor has a right by law to re-enter (*c*) (whether he actually enter or no (*d*)).

A lessor has no such right unless he expressly reserve it (*e*).

(*q*) 22 & 23 Vict. c. 35, s. 4.

(*r*) *Peachey* v. *Duke of Somerset*, 1 Strange, 447.

(*s*) *Sloman* v. *Walter*, 1 B. C. C. 418.

(*t*) *Peachy* v. *Duke of Somerset*, 1 Strange, 447.

(*u*) *Ibid.*

(*x*) *Bowser* v. *Colby*, 1 Hare, 128.

(*y*) *Ibid.* p. 131.

(*z*) C. L. P. Act, 1852, s. 21.

(*a*) C. L. P. Act, 1860, ss. 1, 210.

(*b*) C. L. P. Act, 1852, c. 76, s. 212; C. L. P. Act, 1860, s. 1.

(*c*) C. L. P. Act, 1852, s. 210.

(*d*) 1 Hare, at p. 128.

(*e*) Cole on Ejectment, 416.

(c.)

Lessee has not committed other breaches of contract for which he might be ejected at law (*f*).

2.

Breaches which Equity deems essential, and will not relieve against.

(i.)

Covenant to repair generally (*g*) or specifically (*h*).

[This last is, however, really a stipulation as to time (*i*).]

(ii.)

Covenant to build within a given time (*k*).

[This is, however, really a stipulation as to time.]

(iii.)

Covenant to cultivate land in a husbandlike way (*l*).

(iv.)

Covenant not to carry on trade in a house (*m*).

(v.)

Covenant not to assign or let without leave (*n*).

(vi.)

Breaches by shareholders of a company's bye-laws (*o*).

(vii.)

Breaches of provisions in a statute (*p*).

(*f*) *Bowser* v. *Colby*, 1 Hare, at p. 134.

(*g*) *Gregory* v. *Wilson*, 9 Hare, at p. 683.

(*h*) *Hill* v. *Barclay*, 18 Ves. at p. 64.

(*i*) *Supra*, p. 65.

(*k*) *Croft* v. *Goldsmid*, 24 Beav. 312.

(*l*) *Hills* v. *Rowland*, 4 De G., M. & G. 430.

(*m*) *Macher* v. *Foundling Hospital*, 1 V. & B. 188.

(*n*) *Hill* v. *Barclay*, 18 Ves. 56.

(*o*) *Sparks* v. *Liverpool Waterworks*, 13 Ves. 428.

(*p*) *Keating* v. *Sparrow*, 1 Ball. & B. at p. 373.

(III.)

Compensation for Breach of Stipulation by Misdescription of the Quantity or Quality of the Estate purchased, or of Vendor's Interest.

Rule in Equity.

Where a misdescription is small, equity will, nevertheless, decree specific performance, the purchaser giving or receiving compensation (*r*).

But where it is substantial (*s*) (*e. g.*, the nature of the tenure, as copyhold for freehold (*t*); or in quantity, as an underlease for a lease (*u*)), it is of the essence, unless waived (*x*).

Equity will more readily consider the stipulation unessential at the instance of a purchaser, than of a vendor, since the latter is author of the error (*y*).

Exceptions to Rule.

If the purchaser knew the vendor had less than he stipulated for; in which case, if the knowledge be express, his action will be dismissed (*z*). He will not be entitled to take it with compensation.

[Constructive knowledge will not disentitle him to specific performance *without* compensation (*a*).]

If he suppress wrongful acts done by himself, the knowledge of which would have given vendor a claim against him (*b*).

(*r*) *Halsey* v. *Grant*, 13 Ves. at p. 77.

(*s*) *Long* v. *Fletcher*, 1 Eq. Cas. Abr. 5.

(*t*) *Ayles* v. *Cox*, 16 Beav. 23.

(*u*) *Madeley* v. *Booth*, 2 De G. & Sm. 718.

(*x*) *Fordyce* v. *Ford*, 4 B. C. C. 494.

(*y*) 2 Tudor's L. Cas. Eq. 547.

(*z*) *Barnes* v. *Wood*, 8 Eq. 424.

(*a*) *James* v. *Lichfield*, 9 Eq. 51.

(*b*) *Phillips* v. *Homfrey*, 6 Ch. 770.

Chapter VIII.

ON MANDAMUS, INJUNCTION AND RECEIVERS.

36 & 37 Vict. c. 66, sect. 25, sub-sect. 8.

"*A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally, or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after, the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.*"

As to the practice hereon, see Judicature Act, 1875, Order LII., Rule 4.

[**A.**]

"*A Mandamus.*"

The common law remedy of *mandamus* is for the first time to be universally applicable. Hitherto, as is well known, a Court of Equity was, by a strange anomaly, incompetent to *order* (*a*); and a Court of Common

(*a*) *Robinson* v. *Lord Byron*, 1 B. C. C. 588.

Law incompetent to *restrain*, the doing of a positive act. By a still stranger anomaly, a Court of Equity *was* able to do, in this respect, indirectly what it could not do directly, by means of what was called a mandatory injunction, a remedy (that is to say) partaking of both the character of mandamus and injunction. It was such an injunction as restrained the defendant from allowing things to remain in their existing, and so compelled him to restore them to their original, state (*b*).

Thus an injunction restraining him from detaining and keeping possession of the books of plaintiff, removed by him from plaintiff's chambers, and from permitting the same to remain away therefrom, or from parting with the books so removed to any one but the plaintiff (*c*), was virtually an order to restore them.

[B.]

"*Any threatened or apprehended Waste or Trespass.*"

Waste, as contrasted with trespass, was used, it is said (*d*), in the old cases, not in the sense of spoliation, but in a "technical and personal sense" (*d*), (whatever that means).

The Court (of Chancery) for a long time confined relief in equity to waste; founding its interposition on the privity between the parties (*e*). Lord Thurlow first extended it to cases of trespass (*f*).

The tendency of the Court is to "break down" the old unreasonable distinction between waste and trespass (*g*). "Waste" is commonly used, it has been said,

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(*b*) Joyce on Injunctions, 1309.

(*c*) Seton on Decrees, 3rd ed. 936.

(*d*) 12 W. R. 401.

(*e*) *Davenport* v. *Davenport*, 7 Hare, 217.

(*f*) *Lowndes* v. *Bettle*, 33 L. J., N. S., Ch. 451; 12 W. R. p. 399; 3 N. R. 401.

(*g*) *Ibid.*

of acts by persons in rightful possession (*h*), and therefore is not in fact waste in the proper sense (*i*).

But spoliation seems to indicate the degree, not the kind, of injury to property; and if so, might be committed as well by a person in privity of estate as by an entire stranger.

[C.]

"*Whether the Person against whom such Injunction is sought is or is not in Possession under any claim of Title or otherwise.*"

This part of the sub-section has evident reference to, and was doubtless suggested by, the anomalous state of the previous rules of equity as pointed out in the comprehensive judgment of Vice-Chancellor Kindersley in *Lowndes* v. *Bettle.* The clause appears to refer only to defendants in possession. It would, therefore, have run better thus: "Whether the person, &c. is in possession under any claim of title or not." As it stands now, it may grammatically apply to defendants not in possession. The words "or otherwise," moreover, seem superfluous: for a defendant in possession, but not in possession under any claim of title, is a defendant in possession "otherwise" (than by claim of title), and his case is provided for by the earlier words, "is not in possession under any claim of title." Moreover, the words "under any claim of title or otherwise" seem wrongly introduced; the "foundation of the distribution of the cases" (*j*), where the defendant is in possession, being the fact not of his having any claim of title—that was the test where he was *out* of possession—but his being in possession anyhow and by whatever

(*h*) *Supra*, Ch. III.
(*i*) 33 L. J., Ch. 451.
(*j*) 12 W. R. 401.

means: the Court feeling much more reluctance to entertain a suit against a party in possession than where he is not. The question, therefore, which party is in possession, was one of great importance, and often not easy to answer (*k*).

Now that the Supreme Court is invested with such absolute discretionary powers in granting injunctions as the sub-section gives it, it is doubtful whether it will be guided by the principles and distinctions hitherto laid down in the matter; but it is presumed that it will, in order to keep the current of equity authority, as far as possible, uniform. If so, those principles and distinctions, *so far at least as they regard injunctions against trespass*, cannot be better classified and summarized than they have been in the admirable judgment of Vice-Chancellor Kindersley (*l*) above referred to, and which may be thus tabulated. (The Vice-Chancellor, however, seems to have had in his mind cases of trespass strictly so called only.)

1.

Plaintiff out of Possession, with an adverse Claim, seeking to restrain Defendant in Possession.

[The case of a claim under privity of title will hardly arise.]

The Court grants the injunction only when there is fraud or collusion, or the acts are flagrant.

2.

Plaintiff in Possession, seeking to restrain Defendant out of Possession.

(i.)

Defendant claiming under colour of Title.

The Court inclines to grant the injunction, where the spoliation is irremediable.

(*k*) 12 W. R. 401. (*l*) 33 L. J., N. S., Ch. 451.

(ii.)
Defendant an absolute Stranger.

The Court inclined to refuse an injunction except under special circumstances, or in case of destruction; and to leave plaintiff to his remedy at law (*m*).

[D.]
"*Or a Receiver appointed.*"

As there is no prevalence or conflict of the rule in equity further than that an absolute discretion is reposed in the Court,—which will enable it to appoint receivers at the instance of a legal mortgagee (*n*),—it is not within our subject to treat of them generally.

[E.]
"*Whether the Estates claimed by both or either of the Parties be Legal or Equitable.*"

Semble, these words apply only to injunctions, and not to the appointment of a receiver (*o*).

(*m*) Kerr, 292.

(*n*) *Pease* v. *Fletcher*, 1 L. R., Ch. D. 273.

(*o*) *Habershon* v. *Gill*, W. N. Dec. 4, 1875.

Chapter IX.

DAMAGES FOR COLLISION OF SHIPS.

36 & 37 Vict. c. 66, sect. 25, sub-sect. 9.

> "*In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, as far as they have been at variance with the rules in force in the Courts of Common Law, shall prevail.*"

It is remarkable that in the earlier prints of the Judicature Bill the Common Law Rule was preferred. It would seem, therefore, there is not any clearly defined principle of jurisprudence involved in this change, and as if it had been pretty much a toss up in Committee which rule should prevail!

Common Law Rule.

The rule hitherto in force on this subject at common law has been, that if the mischief be the result of the combined negligence of the two (masters of the) ships, they must both remain *in statu quo*, and neither party can recover against the other (*a*).

Admiralty Rule.

The rule in the Admiralty Court is, that the loss must be apportioned equally between the ships, although one ship is most to blame (*b*).

(*a*) Bayley, J.: *Vennall* v. *Garner*, 1 Cr. & M. p. 21.

(*b*) *Hay* v. *Le Neve*, 2 Shaw, Sc. App. Cas. 395.

[But the shipowner's liability is limited to the value of the ship and freight (*c*).]

Unless the loss has happened through his own fault or privity (*d*).

No interest was given in the last cited case, and each party paid their own costs.

(*c*) 17 & 18 Vict. c. 104, s. 503. (*d*) *Ibid.*

Chapter X.

ON THE CUSTODY AND EDUCATION OF INFANTS.

36 & 37 Vict. c. 66, sect. 25, sub-sect. 10.

"*In all questions relating to the custody and education of infants the rules of equity shall prevail.*"

[This would seem to include questions of Access, as ancillary to custody, but not rights over an infant's estate, except so far as they are necessarily involved in questions respecting custody or education.]

The Divorce Court may make such orders as it deems just respecting the custody and education of children (*a*), under 16 (*b*), whose parents' marriage is the subject of a suit there, and for placing them under the protection of Chancery (*c*); but as this statutory jurisdiction does not affect the principles or jurisdiction of Chancery (*d*), we need not pursue it any further.

[**A.**]

Custody.

(1.)

Father.

(1.)

(Legitimate Infant.)

Rule in Equity.

The father, though resident abroad (*e*), and though the infant be born (*f*), or is resident (*g*), abroad, or is

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(*a*) 20 & 21 Vict. c. 85, s. 35.

(*b*) *Ryder* v. *Ryder*, 2 Sw. & Tr. 225.

(*c*) 20 & 21 Vict. c. 85, s. 35.

(*d*) *In re Curtis*, 28 L. J., N. S., Ch. 458.

(*e*) *Re Emily Suttor*, 2 Fost. & Finl. 267; 2 Tudor's L. Cas., Eq. 67. This was, however, only a decision on a *habeas corpus* at common law chambers.

(*f*) *Hope* v. *Hope*, 8 De G., M. & G. 731.

(*g*) *Ibid.*

of tender years (*h*), has a primary right by his guardianship by nature and nurture (*i*) to the custody (which has been secured to him by a penal Act till sixteen in females) (*j*), the mother having access, at least if the infant be a ward of Court (*k*).

The wardship of infants is assigned to the Chancery Division of the Supreme Court (*l*).

An infant becomes a ward of Court immediately an action is begun for or against him relating to his property or person (*m*); or an order is made, even on summons in chambers, without suit, for payment of a legacy for his maintenance (*n*), or of the income of a fund paid in under the (*o*) Trustee Relief Act; or where the order is simply for appointing a guardian (*p*), but not on an application under the Infant's Settlement Act (*q*).

[So essential is property, in order to give the Court the means of enforcing its jurisdiction, that, where there is none, it is usual to settle on the infant and pay into Court even a nominal sum (*e.g.*, 20*l.* (*r*) or 100*l.* (*s*)), in order to fulfil the object of the Court in requiring property, viz., its having "the means of applying it for his use and maintenance" (*t*); though no substantial use can be made of a nominal sum! and, as Mr. Forsyth has well observed (*u*), where the only object of the application to Court is to remove him from illegal or improper custody, property or no property seems immaterial.]

(*h*) Jac. 251, n.

(*i*) When this ends, *infra*, p. 86.

(*j*) 24 & 25 Vict. c. 100, s. 55.

(*k*) Jac. 264, n.

(*l*) Judicature Act, 1873, s. 34.

(*m*) *Hughes* v. *Science*, 2 Eq. Cas., Abr. 756, pl. 14.

(*n*) *Re Graham*, 10 Eq. 530.

(*o*) *Re Hodge's Settlement*, 3 K. & J. 213.

(*p*) *Stuart* v. *Marquess of Bute*, 9 H. L. at p. 457.

(*q*) *Re Dalton*, 6 De G., M. & G. 204.

(*r*) *Andrews* v. *Salt*, 8 Ch. 627.

(*s*) M'Pherson on Infants, 103.

(*t*) *Wellesley* v. *Duke of Beaufort*, 2 Russ. 21.

(*u*) Custody of Infants, p. 25.

This right of a father is not waivable by him, being a duty as well as a privilege, even on his adultery or cruelty to his wife (*x*). And agreements having that object in view will not be specifically performed, though if a deed had been actually *executed*, the Chancery Division would enforce any of its stipulations which are in accordance with law (*y*).

Exceptions to Rule.

[The reasons for the Court's interference having been in most cases more than one] (*z*).

(i.)

Much more weight is given to the wishes of female infants as to custody, if of years of discretion—which depends, at least at law, on age not mind, and is fourteen in boys and sixteen in girls (*a*)—than of males (*b*); and they have been examined upon them, even without any fault in the father (*c*).

(ii.)

Where the father, without in the least demoralizing the infant by his teaching or example, treats him with such violence, harshness, or cruelty as shows him utterly unfit to have the conduct or management of children (*d*).

(iii.)

Where the father, being unable to maintain the infant, has separated from his wife, and deserted (*e*) the infant, or endangered his property (*f*), or disappointed his expectations, if solid ones (*g*).

(*x*) *Vansittart* v. *Vansittart*, 2 De G. & J. 255, where the written memorandum was signed by the husband and wife.

(*y*) *Ibid.* 258.

(*z*) Simpson on Infancy, 137.

(*a*) *Re Andrews*, 8 L. R., Q. B. at p. 159.

(*b*) Simpson on Infancy, 139.

(*c*) *Ex parte Hopkins*, 3 P. Wms. 152.

(*d*) *Curtis* v. *Curtis*, 5 Jur., N. S. (Ch.) 1147.

(*e*) *Re England*, 1 R. & M. 499.

(*f*) 2 Tud. L. C. Eq. 685.

(*g*) Jac. 265, n.

[But insolvency alone will not disentitle him] (*h*).

(iv.)

"Where the father, being of a perverted mind in respect of religious (*i*) or moral views or habits, is inculcating such habits or views on his children, so as to be most grievously detrimental to them in after life as members of society" (*k*).

(v.)

If the father has waived his right by accepting a pecuniary benefit (not a mere offer (*l*)) for himself (*m*), or for the infant (*n*), from a stranger, who has prescribed the custody, such custody having been adopted by the father (*o*).

The father in this case, however, will be allowed access (*p*).

[This waiver is distinguished from the prohibited waiver mentioned above (*q*), on the ground, according to Mr. Tudor (*r*), that it is not, as the former, a merely executory contract still *in fieri*, and unperformed, but that it has been carried into execution by acts done, *e. g.*, the giving up the custody and acceptance of the benefit.]

(vi.)

The Court may order access, or the custody, to the mother till sixteen, subject (in the latter case) to access of the father or guardian (*s*).

[This, however, is a statutory rule rather than one of "equity."]

(*h*) *In re Curtis*, 28 L. J., Ch. 458.
(*i*) As in *Shelley* v. *Westbrooke*, Jac. 266, n.
(*k*) Per V. C. Kindersley, *Curtis* v. *Curtis*, 5 Jur., N. S. (Ch.) 1147.
(*l*) Jac. 265, n.
(*m*) *Colston* v. *Morris*, Jac. 257, n.
(*n*) *Lyons* v. *Blenkin*, Jac. 245, n.
(*o*) *Potts* v. *Norton*, 2 P. W. 109.
(*p*) 10 Ves. 649.
(*q*) *Supra*, p. 84.
(*r*) 2 Tud. L. C. Eq. 679.
(*s*) 36 & 37 Vict. c. 12.

Parents will be restrained from taking the infant abroad, if a ward of Court (*x*), without leave.

[This, however, does not necessarily involve removal from the custody.]

(2.)

Illegitimate Infant.

A bastard being *nullius filius*, the father has no legal right to the custody, but if bound to maintain him under the Poor Law Acts, it would seem he has (*y*).

(II.)

Mother

(Father being dead, and no Testamentary Guardian).

She is spoken of in Courts of Equity as guardian by nature (*z*) (*i.e.*, till twenty-one in males, and twenty-one or marriage (*a*) in females) and nurture (*b*) (*i.e.*, till fourteen in both sexes (*c*).

(1.)

Legitimate Infant.

(i.)

Infant under the age of Discretion (*d*).

Rule in Equity.

The custody by the mother—who is within 24 & 25 Vict. c. 100 (*e*)—is never departed from; it is paramount to education in any particular denomination of the Christian religion (*f*); and does not necessarily cease on her re-marriage (*g*).

Exceptions to Rule.

(a.)

Her immorality (*h*); or unnatural treatment of infant (*i*).

(*x*) *De Manneville* v. *De Manneville*, 10 Ves. 52.
(*y*) *Re Lloyd*, 3 Mann. & Gr. 547.
(*z*) 2 Sw. at p. 536.
(*a*) 4 Bac. Abr. 7th ed. 105.
(*b*) Simpson on Infancy, 113.
(*c*) Hargr. n. 13 to Co. Littl. 88, b.
(*d*) What is, *supra*, p. 84.
(*e*) *Supra*, p. 83.
(*f*) *Austin* v. *Austin*, 34 Beav. 259.
(*g*) *Villareal* v. *Mellish*, 2 Sw. 533.
(*h*) 34 Beav. at p. 263.
(*i*) *Ibid.*

(b.)

Her contempt of (*k*), or disobedience to (*l*), Court.

(c.)

Where the parents' religions are different—which does not necessarily preclude her right to custody—(*m*), application has been ordered by the Court to be made respecting it, on the infant attaining seven (*n*).

(ii.)

Infant of the age of Discretion (*o*).

Rule in Equity.

The same weight is given to the wishes of the infant, as in the case of the father (*p*).

(2.)

Illegitimate Infant.

Mother has no right to the custody, either at law (*q*) or in equity (*r*), but will be allowed access (*s*).

(III.)

Testamentary Guardian and Guardian appointed by the Court.

The Court controls the latter less reluctantly (*t*).

Though called testamentary, father may appoint him by deed (*u*) (*qu.*, without a witness?) (*x*).

Direction in the will that wife shall have the *education* may amount to a devise of guardianship (*y*).

Rule in Equity.

He is entitled to the custody as (*z*) against the mother,

(*k*) 1 Ves. sen. 158.

(*l*) *Re Newbery*, 1 Ch. at p. 267.

(*m*) Simpson, p. 122.

(*n*) *Austin* v. *Austin*, 34 Beav. 265, n.

(*o*) What is, *supra*, p. 84.

(*p*) *Supra*, p. 84.

(*q*) 7 East, 579.

(*r*) *Courtois* v. *Vincent*, Jac. 268, n.

(*s*) *Ibid.*

(*t*) *Re Goode*, 1 Ir. Ch. Rep. 256.

(*u*) 12 Chas. 2, c. 24.

(*x*) 19 Beav. at p. 87.

(*y*) 1 Ves. sen. 91.

(*z*) *Eyre* v. *Shafteshury*, 2 P. Wms. 103; Chambers on Infancy, 36.

she having access (*s*), though the Court will, under special circumstances, leave the infant with her, giving the guardian access (*t*).

The legal custody, however, would in such a case still be that of the guardian.

Exceptions to Rule.

(1.)

If the guardian be insolvent or bankrupt (*u*).

(2.)

If he behave (*x*) improperly.

(3.)

If father has recommended, and the guardian has allowed, some one else to have it (in which case he will have a general supervision only (*y*), *e. g.*, as to change of residence, governors, &c.).

May not remove them abroad, if wards of Court, without leave of the Court (*z*).

A testamentary guardian's right to the custody ends, with females, on marriage under 21; with males on 21 (*a*), unless father otherwise direct (*b*).

[The infant, at least if a female, may choose her custody, as between several testamentary guardians (*c*), or, on their ill-treatment, generally (*d*).

No other guardian can be *appointed* during parents' or testamentary guardian's office (*e*), but the Court may appoint another person to *act as* guardian where the removal from the natural or statutory guardianship, tested as above, is expedient.

(*s*) 7 Ves. 380.

(*t*) *Talbot* v. *Earl of Shrewsbury*, 4 M. & Cr. 672.

(*u*) *Smith* v. *Bate*, 2 Dick. 631.

(*x*) *Duke of Beaufort* v. *Bertie*, 1 P. Wms. 704.

(*y*) *Knott* v. *Cottee*, 2 Phillips, 192.

(*z*) *Campbell* v. *Mackay*, 2 M. & Cr. 31.

(*a*) *Mendes* v. *Mendes*, 1 Ves. sen. 91.

(*b*) 2 P. Wms. 103.

(*c*) *Storke* v. *Storke*, 3 P. Wms. 52.

(*d*) *Anony.* 2 Ves. sen. 374.

(*e*) *Ex parte Mountfort*, 15 Ves. 447.

[B.]

"*Or Education.*"

School Board may compel parents to send to school (*b*).

(I.)

Father.

(1.)

Legitimate Infant.

Rule in Equity.

The father has the first right to educate, and prescribe the education, general or religious, of the infant (*c*).

The Court pays a "sacred regard to the religion of the father" (*d*).

The Court infers (*e*) the father's wish to be that the infant shall be educated in his own religion unless he direct otherwise.

The greater happiness, and possibly the better pecuniary provision for the infant involved in his being educated in a religion different from the father will not, *per se*, weigh with the Court (*f*). The religious faith is not to be matter of barter in the Court (*g*).

Exceptions to Rule.

(i.)

Where there is *laches* or waiver by him (*h*), or by the testamentary guardians (*i*), of his right.

In determining this waiver, an ante-nuptial agreement, though it does not bind him (*k*), will weigh with the Court.

(ii.)

Where a stranger, by pecuniary benefits given to the father or infant, and accepted by the father, has *purchased* (*l*) the right of prescribing the education.

(*b*) Education Act, 1870, sect. 74.

(*c*) *Talbot* v. *Earl of Shrewsbury*, 4 M. & C. 672.

(*d*) *Hawkesworth* v. *Hawkesworth*, 6 Ch. at p. 542.

(*e*) *Re North*, 11 Jur. at p. 10.

(*f*) *Andrews* v. *Salt*, 8 Ch. 638.

(*g*) 4 M. & Cr. 672.

(*h*) *Hill* v. *Hill*, 10 W. R. 400.

(*i*) *Andrews* v. *Salt*, 8 Ch. at p. 637.

(*k*) *Ibid.*

(*l*) *Lyons* v. *Blenkin*, Jac. 245.

(iii.)

Where impressions have been made on, or permanent opinions different from the father's have been formed by, the infant, if of years of discretion, or a precocious child of tender years (*m*).

(iv.)

Where he is morally unfit to have the education (*n*).

(2.)

Illegitimate Infant.

Being *nullius filius*, father has no right to the education, having none to the custody (*o*).

(II.)

Mother

(Father dead, no Testamentary Guardian).

Has a right to prescribe the secular education. As to the religious education, the same rule and exceptions as in case of 'father' (*p*).

(III.)

Testamentary Guardian (including mother) and Court Guardian.

Rule in Equity.

He may regulate the mode and place of education (*q*), subject to the wishes of the father, and (in the case of Court guardians) subject to order of the Court first obtained.

Must bring infant up in same religion as father, unless he or the Court direct otherwise (*r*).

[C.]

Habeas Corpus.

Has only to do with custody, not education. It

(*m*) *Stourton* v. *Stourton*, 8 De G., M. & G. 760.

(*n*) *Anony.*, 2 Sim., N. S. at p. 77.

(*o*) *Supra*, p. 86.

(*p*) *Supra*, p. 89.

(*q*) *Hall* v. *Hall*, 3 Atk. 721.

(*r*) *Supra*, p. 89.

was, before the Judicature Acts, issuable as of course, unless infant was a ward of Court, in which case it would be refused (*s*), by any one on allegation that the infant was detained in illegal custody, and must be peremptorily complied with, the justification of the detainer, if any, coming out on the bringing up of the body, or return.

The Court will not only set free from improper, but, if infant be too young to choose (*t*), deliver to proper, custody (*u*).

[The jurisdiction of the Court of Chancery upon *habeas corpus* in infancy (transferred by the Judicature Acts to the Supreme Court (*x*)), was part of the common law jurisdiction of the great seal, and exactly the same as that of the common law judges (*y*). Therefore there is in such case no "conflict or variance" generally between law and equity within sub-sect. 11, and no rules of equity to "prevail" within this sub-section.

But the Court of Equity would, before the late Acts, restrain on proper occasions a father or other person from suing out a *habeas corpus* (*z*), or proceeding on it, if sued out.]

(*s*) Forsyth, 54; *Wellesley* v. *Wellesley*, 2 Bligh, N. S. 142.

(*t*) *Re Andrews*, 8 L. R., Q. B. at p. 158.

(*u*) *Rex* v. *Isley*, 5 Ad. & Ell. 441.

(*x*) Judicature Act, 1873, sect. 16, (1).

(*y*) *Anony.*, Jac. 254.

(*z*) M'Pherson, 162.

Chapter XI.

CASES OF CONFLICT NOT ENUMERATED.

36 & 37 Vict. c. 66, sect. 25, sub-sect. 11.

> "*Generally, in all matters not hereinbefore particularly mentioned, in which there is any conflict and variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.*"

This, like the old general prayer for relief in a bill, comprehends, it is hardly necessary to observe, all the subject-matter of the previous sub-sections, *with much more.*

To enter upon this wider field is beyond the province of the present Treatise, and would involve a disquisition upon Law and Equity generally.

It may be well asked, however, why such of the ten preceding sub-sections as contain instances of *special* variance and conflict between Law and Equity (*i. e.* sub-s. 3, 4, 6, 7, 10) were deemed necessary by the draughtsman of the Act, since he intended to gather, and has effectually gathered, up everything into his mesh, in one swoop, by this general conclusion; and since the whole contains its parts, and the universal the particular?

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